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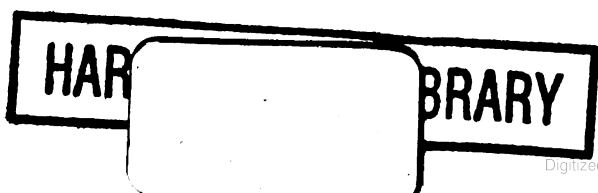
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REPORTS OF CASES

DECIDED IN

THE SUPREME COURT

OF THE

STATE OF UTAH

ALONZO BLAIR IRVINE

REPORTER.

VOLUME XXXVII.

DECEMBER, 1909—AUGUST, 1910.

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JUDGES AND OFFICERS
OF THE
THE SUPREME COURT
OF THE
STATE OF UTAH.

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HON. D. N. STRAUP

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REPORTER OF DECISIONS
ALONZO BLAIR IRVINE

TERMS OF COURT
SECOND MONDAY IN FEBRUARY. SECOND MONDAY IN MAY.
SECOND MONDAY IN OCTOBER.

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(Including the counties of Box Elder, Cache and Rich)

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SECOND DISTRICT

(Including the counties of Davis, Morgan and Weber)

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HON. NATHAN J. HARRISOgden

THIRD DISTRICT

(Including the counties of Salt Lake, Summit and Tooele)

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(Including the counties of Garfield, Kane, Piute, Sevier and Wayne)

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(Including the counties of Carbon, Emery, Grand, San Juan and Sanpete)

HON. A. H. CHRISTENSEN.....Manti

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DISTRICT OF UTAH**

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The terms of the District and Circuit Courts for Utah are held as follows:
At Salt Lake City, second Monday in April and November; at Ogden, second
Monday in March and September.

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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF UTAH.

(Continued from Volume 36.)

MILLER v. MT. NEBO LAND & IRRIGATION COMPANY et al.

No. 1997. Decided January 3, 1910 (106 Pac. 504).

1. TRIAL—FINDINGS—CONFLICTING FINDINGS. The complaint alleged the purchase from defendant of a tract of land with irrigation rights, for the contract price of \$1150, and the contract showed a payment thereon of \$247.50 when it was executed, and the complaint alleged that plaintiff rendered services for defendant to the value of \$986, which the answer denied, but admitted that the services were of the value of \$597.75. The court found that a payment of \$247.50 was made, and allowed \$400 as damages for a breach of the contract, and found that \$403 was yet due on the contract price, but made no finding as to the value of plaintiff's labor. *Held*, that, as the amount which defendant admitted to be the value of the labor, together with the amount found to have been paid on the contract and that allowed as damages, aggregated more than the contract price, the finding that \$403 was yet due on the contract was inconsistent with the facts found. (Page 7.)
2. TRIAL—SPECIAL VERDICT—FINDINGS—CONCLUSIONS. In an action for damages for breach of a contract, by failure to furnish water for irrigation as agreed, a finding that the shortage of water was caused by act of God was a mere conclusion which could not aid the judgment. (Page 8.)

APPEAL from District Court, Fourth District; *Hon. J. E. Booth*, Judge.

Action by Martha E. Miller against the Mt. Nebo Land & Irrigation Company and others, in which one of the defendants set up a counterclaim.

Judgment for defendant on the counterclaim. Plaintiff appeals.

JUDGMENT VACATED, AND CASE REMANDED FOR NEW TRIAL.

Edwards, Smith & Price for appellant.

W. R. Hutchinson for respondents.

APPELLANT'S POINTS.

This court has decided in a number of cases that where findings are inconsistent with each other, and against the pleadings, they will be set aside on appeal. (*Sanberg v. Victor Mining Co.*, 24 Utah 1; *Nephi Irrigation Co. v. Jenkins*, 8 Utah 369; *Nephi Irrigation Co. v. Vickers*, 15 Utah 374; *Lost Creek Irrigation Co. v. Rex*, 26 Utah 485.)

RESPONDENT'S POINTS.

If the findings and pleadings taken together fairly justify the judgment, notwithstanding a want of precision and an occasional intermixture of fact and conclusions of law, it is sufficient. (*O'Reilly v. Campbell*, 116 U. S. 418; *Maynard v. Loco. Eng. Ins. Association*, 16 Utah 145, 51 Pac. Rep. 259.)

If a decree in an equity suit is in accordance with the evidence, it makes no difference whether it is supported by the findings or not. (*Maxfield v. West*, 6 Utah 329, 24 Pac. Rep. 98; *Fisk v. Patton*, 7 Utah 399, 27 Pac. Rep. 1.)

'It is of no consequence whether a certain finding is a finding of ultimate fact or a conclusion of law where there are other findings supporting the questionable finding and rendering it practically unnecessary. (*Snyder v. Emerson*, 19 Utah 319, 57 Pac. Rep. 300.)

STRAUP, C. J.

The Mt. Nebo Land & Irrigation Company, a corporation, was engaged in the business of developing and conducting water for irrigation and other beneficial purposes, and was the owner of certain reservoirs, franchises, privileges, and water rights in and to the waters of Little Salt Creek Canyon and Current Creek, and their tributaries, and was also the owner of certain lands in the vicinity of such creeks. In September, 1897, it entered into a written agreement with the plaintiff, by the terms of which it agreed to convey to plaintiff twenty-five acres of land and a certain quantity of water, to be delivered by it from such creeks, upon the payment of \$1150, \$247.50 of which was paid upon the execution of the contract, and the balance to be paid in annual payments of \$218.87 each, together with interest on the deferred payments. It was further stipulated in the contract that the company was required to deliver the water during the irrigation season of each and every year, extending from April to October, and to keep and maintain the canal system and the reservoirs in good order and condition. It was also stipulated that the company should not be responsible for deficiency of water "caused by the act of God, forcible entry, or temporary damage by floods or other accidents, but the irrigation company shall use and employ all due diligence at all times in restoring and protecting the flow of water in its canals and laterals." The contract contains other provisions not necessary here to be noticed. In September, 1899, the plaintiff and the irrigation company entered into another written contract, by the terms of which the company agreed to convey to her seven and one-half acres of land, and certain water rights, for the sum of \$750, \$200 of which was paid when the contract was executed, the bal-

ance to be paid in four equal payments of \$137.75 each, together with interest at seven per cent. per annum.

The execution and terms of these contracts were alleged in the complaint. The plaintiff further alleged that the sum of \$247.50 was paid by her on the first contract, and that in the year 1900 she, at the instance and request of the defendant irrigation company, rendered and performed services for said company, the value of which was agreed between them to be \$652.25, and that in 1905 she again rendered services for said defendant in repairing and cleaning the canals and ditches, and that such work was reasonably worth \$333.75. She further alleged that she had performed all the conditions of the contract on her part to be performed, but that the said defendant, between the years 1901 and 1906, both inclusive, "failed, neglected and refused to furnish and deliver the water therein agreed to be furnished by it" to plaintiff's damage in the sum of \$809.75, and that it also failed and refused to convey the lands to the plaintiff, notwithstanding her demand for a conveyance. She also alleged that she had fully performed all the conditions of the second contract on her part to be performed, and that the said defendant, during the years 1901 to 1906, both inclusive, had likewise failed and refused to deliver the water agreed to be delivered by that contract, to her damage in the sum of \$499, and that said defendant had also refused to convey the lands agreed to be conveyed to her by that contract, notwithstanding her demand for a conveyance. She prayed a judgment decreeing a conveyance of the lands to her, and a money judgment in the sum of \$1038.75.

The irrigation company and the other defendants answered, admitting the contracts, and that the plaintiff had "paid in labor" on the first contract the sum of \$597.75, and alleging that there was due and unpaid by reason of that contract, together with interest, the sum of \$1424.34, no part of which had been paid. They admitted that the sum of \$200 was paid on the second contract, and that labor was performed by plaintiff to the value of \$57.50 which should also be applied thereon, but alleged there was due on that

contract the sum of \$1140, no part of which had been paid. It further alleged that it had a lien on the real estate agreed to be conveyed for the payment of such sums, and that all its right, title, and interest in and to the contracts and to its lien had been sold and assigned to the defendant H. W. Brown. It further alleged "that from about the year 1901 to about 1906 there was a shortage of water in the reservoir of said system, caused by the act of God, over which defendants had no control, and by the terms of said (first) contract were not held liable; that plaintiff secretly took from said water system, during all of said period, more than the quantity of water named in said agreement, and used the same upon the said described lands." It denied plaintiff's damages resulting from its failure to furnish and deliver water. The defendants, the irrigation company and Brown, thereupon prayed that the plaintiff take nothing by her complaint, and that Brown be given judgment against her for the sum of \$1424.34, with interest, on account of the first contract, the sum of \$1140, with interest, on account of the second contract, and that the lands mentioned and described in the contracts be sold, and the proceeds of sale applied in payment thereof.

A jury was called in the case. Whether advisory merely, or otherwise, is not clear. However, the only question of fact submitted to them was that of damages to the plaintiff by reason of the irrigation company's failure to furnish plaintiff "sufficient water for irrigation in accordance with" the alleged contracts. In that connection the court charged the jury that, if the plaintiff did not get sufficient water due to an insufficient snow and rainfall, "the defendant would not be liable under the contract, as that would be what the contract calls 'the act of God.'" The jury rendered a verdict for the plaintiff on the first cause of action, which was based on the first contract, assessing her damages at \$400, and on the second cause of action, based on the second contract, at \$150. The court itself made findings, in which it is found that in September, 1897, the plaintiff paid to the irrigation company the sum of \$247.50 on the first contract. The court

further found "that after allowing all credits due for work and labor performed, and for damages to the plaintiff by the defendant upon said (first) contract, and crediting the amount of the verdict of the jury rendered in said cause, there was still remaining due and unpaid from the plaintiff to the defendant Brown the sum of \$403, together with interest thereon at eight per cent. per annum from the — day of January, 1908." The court found that the plaintiff paid upon the second contract "all of the consideration therein named, except the sum of \$207," and "after allowing all payments made thereon in cash, and made by labor and service, and after crediting the amount of the verdict rendered by the jury for damages," there still remains due and owing on that contract the sum of \$207. The court found that the total amount due the defendant Brown was the sum of \$610, together with interest at the rate of eight per cent. per annum. The court further found "that there was a shortage of water in the reservoir of said system, caused by the act of God, over which defendants had no control, from 1901 up to and including 1906, and that during all of said period plaintiff received her proportionate part of the waters stored by the defendant Mt. Nebo Land & Irrigation Company," and that she was entitled to one acre foot of water under the terms of her contracts, provided that the irrigation company or its successors were not prevented from storing the waters by the act of God or the result of some act over which the defendants had no control. A judgment was entered in favor of the defendant Brown and against the plaintiff for the sum of \$610, together with interest and costs. It was further adjudged that the lands described in the contracts be sold, and the proceeds of sale applied in payment of such amount. From such judgment the plaintiff has prosecuted this appeal on the judgment roll. The errors assigned are that the court failed to find upon all the material issues presented by the pleadings, and that certain of the findings are ambiguous, mere conclusions, and "unsupported by the pleadings."

We think that the findings complained of are open to one or more of the objections raised by the assignment of errors. The contracts as alleged in the complaint are admitted by the answer of the defendants. The contract price of the first contract is \$1150. On the face of it, and by the stipulations in the contract, a payment of \$247.50 thereon at the time of its execution is acknowledged. The plaintiff alleged that, in addition thereto, she rendered services and performed labor to the value of \$986, which should also be applied on the contract. The payment as acknowledged in the contract, and which was also specifically alleged by the plaintiff, is not denied. The defendants denied that the services rendered and labor performed, to be applied on that contract, was of the value of \$986. They admitted "that the plaintiff paid in labor upon said (first) contract" the sum of \$597.75. A finding was therefore required whether the value of the labor was \$597.75 as admitted in the answer, or \$986 as alleged in the complaint, or what the value of the labor was. The court failed to make such a finding. That issue was not submitted to the jury, nor did they make any finding thereon. The only issue submitted to them was on the question of damages resulting from the irrigation company's failure to deliver water in accordance with the contracts. The court, after finding that the sum of \$247.50 was paid on the first contract, merely by way of conclusion stated that, after allowing "all credits due for work and labor performed," and the damages assessed by the jury, there was still due on that contract the sum of \$403. We have no means, except by deductions, of ascertaining what the court allowed "for work and labor performed." The court did allow a payment of \$247.50. That was expressly found. The court also allowed the sum of \$400 damages assessed by the jury. It found still due \$403 and interest. These three amounts make \$1050.50. Deducting that from the contract price of \$1150 leaves \$99.50, which must have been allowed for work and labor. But the defendants admitted that the "plaintiff paid in labor upon said (first) contract" the sum of \$597.75. Taking

the defendants' admission as to the value of the labor, \$597.75, the payment of \$247.50 by the plaintiff as found by the court, the \$400 damages assessed by the jury allowed by the court, making a total of \$1245.25, and the contract price, admitted to be \$1150, we cannot understand how or why there should yet be due on that contract the sum of \$403.

The findings in respect of the second contract are also open to similar objections. The court found that the plaintiff "paid upon said (second) contract all of the consideration therein named except the sum of \$207." Then the court made the conclusion that, after crediting all cash payments, labor performed, and services rendered, which were alleged in the complaint to be \$79 and admitted in the answer to be \$57.50, and the damages assessed by the jury, which were \$150, there was still due \$207 on that contract; that is, the plaintiff having "paid all the consideration" on that contract except \$207, and then after allowing the \$150 damages assessed by the jury, there was still due \$207.

The finding which the court made that the shortage of water was caused by the act of God was, of course a mere conclusion. In the next place the court, when it submitted to the jury the question of damages resulting from the irrigation company's failure to furnish water, instructed the jury that no liability existed if the insufficiency of the supply was due to the "act of God." By the verdict which the jury rendered assessing the damages they necessarily found that the insufficient supply was not due to such cause. As before observed, we are not informed whether the jury was merely advisory or otherwise. However, the court seems to have accepted their verdict as to the amount of damages which the plaintiff sustained by reason of the irrigation company's failure to furnish the supply of water agreed by it to be furnished. Since the court accepted the damages as found by the jury, we cannot see what bearing the finding or conclusion had which the court made that there was a shortage of water due to the act of God, but that the plaintiff received her proportionate part of the waters stored by the irrigation company. But no matter what

theory prompted the finding, it is a mere conclusion, and cannot aid the judgment.

We are of the opinion that the judgment of the court below ought to be vacated, and the case remanded for a new trial, with costs to appellant. It is so ordered.

FRICK and McCARTY, JJ., concur.

MOYER v. LANGTON.

No. 2041. Decided January 3, 1910 (106 Pac. 508).

1. **BOUNDARIES—ESTABLISHMENT—PRIOR SURVEYS.** In a suit to determine the boundary line of property described as a part of "Plat 'A,' Salt Lake City Survey," there was evidence that official surveys had been made of the premises in 1856 and in 1872. One F. testified that as city engineer he surveyed them in the early eighties and that fences and stone wall then marking the boundaries of the premises agreed with the old survey, that the first survey was made in 1847, and that in 1876 there were maps and field notes of a "Salt Lake City survey" in the city engineer's office. It is also shown that a survey was made in 1890, at which time no stones or monuments of the original surveys were found, nor were the field notes of any prior official survey then in existence, but the fences and stone wall which had been accepted by the owners for many years as marking the boundaries were then in existence. The survey of 1890 located the boundaries of the land differently from those indicated by the fences and stone wall. *Held*, that the boundaries of the land established by the prior surveys and by the fences and wall controlled over the location made in the resurvey of 1890, and that deeds made in 1896 and 1905 conveying parts of the premises, which described the land as part of "Plat 'A,' Salt Lake City Survey," were to be interpreted in accordance therewith.†
2. **BOUNDARIES—ESTABLISHMENT—PRESCRIPTION.** Practical location of boundaries acquiesced in for a long period of years will not be disturbed. (Page 17.)

†Holmes v. Judge, 31 Utah, 269, 87 Pac. 1009.

APPEAL from District Court, Third District; *Hon. M. L. Ritchie*, Judge.

Action by G. W. Moyer against James Langton.

Judgment for plaintiff. Defendant appeals.

AFFIRMED.

Edwards, Smith & Price for appellant.

Dey & Hoppaugh and G. W. Moyer for respondent.

APPELLANT'S POINTS.

Appellant contends that the deeds from Mrs. Stoutt to George W. Moyer and James Langton, describing the premises as commencing . . . plat "A," Salt Lake City survey, had reference solely to the survey of 1890, and that each of said grantees bought with a view to the lines established by the later and only survey of record at the time the deeds were made, and that such survey, whether right or wrong, governs. (*Holmes v. Judge*, 31 Utah 281.)

Where a description refers to a map, plat or survey it is made apart of the deed as much as attached thereto. (*Chapman v. Pollack*, 11 Pac. 764; *Smita v. Young*, 43 N. E. 486, 489; *Black v. Sprague*, 54 Cal. 266; *Nixolin v. Schnerderline*, 33 N. W. 33; Cyc., vol. 13, page 633, note 7.)

Where a description commences at an established point such point controls. (*Hale v. Swift*, 63 S. W. 288; *O'Herrin v. Brooks*, 6 S. Rep. 844.)

In Moyer's deed there is no ambiguity, and when the starting point, the northeast corner, lot six, Salt Lake City survey, is found, all is clear and no evidence is proper except to fix the starting point which is fixed by the survey. (*Muldoon v. Deline*, 31 N. E. 1091; *Bradley v. Crane*, 54 N. W. 740; Elliott on Evidence, vol. 1, sec. 602 and note; *Powers v. Jackman*, 50 Cal. 429.)

When the dispute is as to which of two points is the established corner, and one point is where such corners are usually

established and such as to give each one the quantity of land purchased and the other is remote and gives to some more and others less than the quantity of land purchased, it surely will require very small evidence to convince the mind that the former is the true line, than that the latter is. (*Yocum v. Haskin*, 46 N. Y. 1065.)

"A practical location by coterminous owners determine the boundaries and fixes the rights." (4 Enc. of Law, p. 859, [2d Ed.].)

"When the line has been clearly established by practical location marked upon the ground and acquiesces therein for seven years, it is sufficient to establish the line." (4 Enc. of Law, [2d Ed.], p. 863.)

"The continuance of a fence for more than the statutory period (in this case for fifty years) is conclusive presumption that it is the true line." (5 Cyc., 941 and 942.)

"Long acquiescence in a line run by an official surveyor will conclude the parties." (5 Cyc., 950.)

"Lines actually run and marked on the ground are the best evidence of the true location of a survey, and these may be proven by any evidence, direct or circumstantial, competent to prove any other disputed fact." (5 Cyc., 962.)

"The rule for determining lost corners of a survey, when some remain, is to run the lost lines according to the courses and distances in the survey, unless the lines so run do not close the survey with the corners remaining, in which case the courses in the survey must be followed and the distances disregarded, and if the survey cannot then be made to close, the courses themselves must be deviated from. And where vestiges of an ancient boundary are to be seen new posts should be fixed, but they must be placed where the former limit or fence stood." (5 Cyc., 872, together with notes and authorities there cited.)

RESPONDENT'S POINTS.

Where a deed of a lot in a recorded plat describes property by metes and bounds beginning with the words "the corner of," thus making the corner of a lot or block the ini-

tial point of description, the corner referred to is the intersection of the property lines and not the intersection of the line in the center of the street. (*Wegge v. Madler*, 129 Wis. 412; 116 Am. State Reps., 953; *Harley v. VanHouten*, 22 N. J. Law 61; *Smith v. State*, 23 N. J. Law 130.)

A city council has no right to change the boundaries of a street by a resurvey. (*City of Racine v. Emerson*, [Wis.], 39 Am. St. Rep. 819; *Racine v. J. I. Case Plow Co.*, 56 Wis. 539; *State v. Schwin*, 65 Wis. 207; *Miner v. Brader*, 65 Wis. 537; *Koenig v. Jung*, 73 Wis. 178; *O'Rena v. City of Santa Barbara*, 91 Cal. 621; *Diehl v. Zanger*, 39 Mich. 601; *Washington Rock Co. v. Young*, 29 Utah 110 Am. St. Rep. 666; *Pereles v. Gross*, 129 Wis. 122, 110 Am. St. Rep. 901; *Cragin v. Powell*, 128 U. S. 691, 5 Cyc., p. 962, note E; *Holmes v. Judge*, 31 Utah 269.)

STRAUP, C. J.

In 1896 and prior thereto Adeline Stoutt owned a parcel of ground, 10 x 6 2-3 rods, in lot 6, block 33, plat "A," Salt Lake City Survey. The 10 rods faced east on Main Street, and the 6 2-3 faced north on Fifth South Street. The northeast corner of the parcel is the northeast corner of the block. In 1896 she sold to the plaintiff, George W. Moyer, the south 3x6 2-3 rods of the parcel. In 1905 she sold to the defendant, James Langton, 3x6 2-3 rods adjoining on the north the ground sold to Moyer. Later she sold 4x6 2-3 rods to Fleishman lying immediately north of the ground sold to Langton. This suit involves the boundary line between Moyer's and Langton's ground. The strip of ground involved is about four or five feet in width.

The case was tried to the court, who found the facts as follows:

"(1) That on and prior to the 11th day of December, 1896, one Adeline Stoutt was the owner of the following described part or parcel of lot 6, block 33, plat 'A,' Salt Lake City survey, in the county of Salt Lake and State of Utah, to wit: Commencing at the northeast corner of said lot 6, and running thence south 10 rods, thence west 6 2-3 rods, thence north 10 rods, thence east 6 2-3 rods, to the place of beginning.

"(2) That thereafter, on said last mentioned date, said Adeline Stoutt sold and conveyed to said George W. Moyer part of lot 6, in block 33, plat 'A,' Salt Lake City survey, described as follows: Commencing at a point 7 rods south of the northeast corner of said lot 6, thence west 6 2-3 rods, thence south 3 rods, thence east 6 2-3 rods, thence north 3 rods, to the beginning.

"(3) That thereafter, and on or about the 22d day of May, 1905, said Adeline Stoutt sold and conveyed to the defendant, James Langton, part of said lot 6, in block 33, plat 'A,' Salt Lake City survey: Commencing at a point four rods south of the northeast corner of said lot 6, thence west 6 2-3 rods, thence south 3 rods, thence east 6 2-3 rods, thence north 3 rods, to the place of beginning.

"(4) That there are in existence no official monuments of the original Salt Lake City survey, by which or from which the northeast corner of said lot 6, block 33, plat 'A,' Salt Lake City survey, can be fixed and determined.

"(5) That from the earliest period under the Salt Lake City survey as originally made until after the purchase of said property by said plaintiff said lot 6 was marked, bounded, and determined by a fence on the north side thereof, bordering on Fifth South street; also by a fence on the east end thereof bordering on Main street; also by a fence from Main street extending westerly on the line between lots 6 and 7, the same being the south side line of lot 6, for a distance of 6 2-3 rods or more.

"(6) That on or about the year 1883 the then owner of the property described in finding No. 1 herein, with the consent of the owner of the adjacent property bordering on the south, replaced said fence along the line between said lots 6 and 7 by a stone wall about 1½ feet in width and varying from 0.5 to 4.0 feet in height, and extending from said Main street westerly along said line of lots 6 and 7 for a distance of 107.6 feet to a stone wall running north and south.

"(7) That said stone wall along the line between said lots 6 and 7 has stood ever since the same was erected, and still continues to stand, and has been and was recognized and acquiesced in by the said Adeline Stoutt and her predecessors in interest as the south boundary line of her property, consisting of a part of lot 6, as hereinbefore described.

"(8) That said fence along said Main street and the east boundary line of said lot 6, and also said fence along the north boundary of said lot 6 and Fifth South street, has been recognized and acquiesced in ever since the same was constructed, as defining the proper east boundary line and proper north boundary line of said lot 6, and as long as said fences remained standing.

"(9) That after the purchase of said property described in finding No. 1 by said Adeline Stoutt, to wit, in the year 1896, she caused said fence on the north boundary line and said fence on the east boundary line to be removed, and said lot filled and graded; and

no fence has ever been erected to take the place of said fences so removed.

"(10) That on or about the 1st day of April, 1890, the city council of Salt Lake City passed an ordinance whereby it was made the duty of the city engineer to make as soon as the time and means at his command would allow 'a complete resurvey of the entire city, including all streets, sidewalks, alleys, avenues, public squares, parks, and all public or private lands, which shall constitute and be the official survey of the city,' and providing, further, that all lines thereby established shall be perpetuated by substantial and permanent stone monuments, or otherwise, as the city engineer might determine. That thereafter such resurvey was made and approved. That in making said resurvey none of the original marks or monuments were found in any way defining the location of said block 33, including said lot 6, or any of the corners thereof, according to the original official Salt Lake City Survey.

"(11) That at the time when said 'resurvey' was made the old fence on the north side of said lot 6 bounding on Fifth South street, and the old fence on the east end of said lot bordering on Main street, and the stone wall along the south side of said lot 6 to the distance west as hereinbefore found, were then standing, surveyed, located, and platted by the city engineer.

"(12) That in making said resurvey under said ordinance said city engineer established the northeast corner of said block 33, the same being the northeast corner of said lot 6, at a point 5.4 feet south and 2.8 feet west of the original corner and intersection according to said fence lines, and thereby in and by said resurvey made the south line of said lot 6 at Main street 4.1 feet south of the south line of said stone wall and 5.1 feet south of said stone wall at the westerly end of the same.

"(13) That hereto attached is Exhibit 6 for the purpose of representing said fence lines and said stone wall in reference to the lines of the resurvey in connection with the property described in the first finding of fact herein.

"(14) The court further finds that by following the line as marked by the old fences there is sufficient land along the frontage of said block 33 on Main street to give to each of the respective owners his proper portion without any interference.

"(15) The court further finds that the deeds to the plaintiff and defendant, respectively, and also the deed to their said grantor as well as all prior deeds conveying said property, were made without any reference to and were not intended to describe the property according to the resurvey aforesaid.

"(16) That it was mutually intended and understood by the deed of conveyance received by plaintiff as aforesaid that the plaintiff was to and did become the owner of the south 3 rods off of the east 6-2-3 rods of said lot 6, as bounded on the south by the south line of said stone wall.

"(17) That by the deed to the said defendant it was intended that the said defendant should become the owner, and thereby became the owner, of the premises immediately adjoining the premises of said plaintiff on the north as described in the proceeding findings of fact.

"(18) That, according to the aforesaid resurvey of Salt Lake City, the dividing line at Main street between the respective portions or parts of said lot 6 owned by the plaintiff and defendant herein, respectively, is a point 111.4 feet south of the northeast corner of said lot 6, block 33, as established by said resurvey.

"(19) That under the original Salt Lake City survey the northeast corner and the north, east, and south boundaries of said lot 6 are as marked and defined by the fences and wall heretofore erected and hereinbefore described."

Upon these findings, the court entered a judgment fixing the north boundary line of plaintiff's land three rods north of the south line of the stone wall referred to in the findings. The defendant appeals.

In the respective deeds from Adeline Stoutt to Moyer and Langton, the ground conveyed is described as commencing at certain points south of "the northeast corner of lot 6, block 33, plat 'A,' Salt Lake City Survey." The evidence and findings show that the northeast corner of that lot, as shown by the survey of 1890, is at a point about four or five feet south of the point as shown by the fence lines referred to in the findings. Starting at the point as shown by that survey, the south line of lot 6 would be about four or five feet south of the stone wall referred to in finding No. 6, which, since the year 1883, marked the south boundary line of lot 6, and which was recognized and acquiesced in as such. The findings which the court made with respect to the fences and stone wall are not questioned. The principal contention made by the appellant is this: That the description in plaintiff's deed, commencing seven rods south of the northeast corner of lot 6, etc., "Salt Lake City Survey," refers to the corner of the lot as shown by the survey of 1890, and that the north boundary line of plaintiff's ground is therefore seven rods south of that point. In other words, it is argued that the words "Salt Lake City Survey" contained in the deed "had reference solely to the survey of 1890," and that

it must be conclusively presumed, when the plaintiff purchased the land in 1896 and accepted the deed containing such a description, he took it "with reference to the 1890 survey, which cannot be varied by parol evidence." Such argument is based upon the assumption that there is no evidence to show that there was an official survey—a Salt Lake City Survey—of block 33, until the survey of 1890 was made.

In this we think counsel are in error. In each deed of conveyance, from the mayor's deed in 1872 to the time of the last deed, the premises have been described as "lot 6, block 33, plat 'A,' Salt Lake City Survey." There is evidence to show that, when the city was entered under the townsite act, it was platted and laid off into "streets, squares, lots and blocks showing the size of the same," and that official surveys were made in 1856 and 1872. It was also shown that there was a "plat 'A' of Salt Lake City Survey" which was made by Jesse W. Fox, Jr., city surveyor, and which was accepted and approved by the city council of Salt Lake City in February, 1889, as the official plat of Salt Lake City and was filed in the office of the county recorder. Jesse W. Fox, Jr., testified that in the early 80's, and at a time when he was the city engineer of Salt Lake City, he made surveys of different portions of block 33, and that the fence lines, especially the stone wall, agreed with the old survey; that the first survey of plat "A" was made in 1847, and that, when he assumed the duties of his office in 1876, there were maps and field notes of "a Salt Lake City Survey" in the city engineer's office. The evidence shows that the survey which was made in 1890 was not an original survey, but, as found by the court, only a resurvey. A witness who was an assistant city engineer, and who assisted in making that survey, testified that the resurvey of 1890 was made because "there was no records by which we could make surveys for private parties in the city and that the resurvey was made under the instruction of the city council, and that the plat which was then made did not differ in the location of the streets, lots, and blocks from the plats on file of the prior surveys." He further testified that in making such

resurvey a great many stones and monuments—most all of them—of the old survey were found and were followed. It was, however, shown that no stones nor monuments of the original survey, nor of any prior survey, were found on the ground marking the northeast corner of block 33. Nor were the field notes of the original nor of any prior official survey of block 33 in existence. But, when the resurvey was made, the fences, the one on the north of lot 6, the one on the east of that lot, and the stone wall on the south marking the boundary line between lots 6 and 7, were then on the premises. These fences are indicated and shown on the official plat of the resurvey. Counsel for appellant in their brief concede that “there is no dispute in the evidence that lot 6 was bounded by a fence on the north side thereof, bordering on Fifth South Street; also by a fence on the east end thereof bordering on Main Street; also by a fence (the stone wall) on Main Street extending westerly on the supposed line between lots 6 and 7 for a distance of 6 2-3 rods, and that these fences had been erected and maintained so, except where they were replaced by other fences, for a number of years previous to the commencement of this action.” It is, however, claimed by them that, since there was no official survey of block 33 until in 1890, the fences, which were constructed long prior thereto, were not erected nor maintained along the line of, nor in accordance with, any official survey, and were therefore not evidentiary of the boundary lines nor of the established corners of the lot, which, they assert, were not established until in 1890. Upon the record we cannot agree with the contention that there was no Salt Lake City 1 survey until the survey of 1890, nor that the boundary lines and corners of lot 6 and of block 33 were not established until in 1890, nor that the survey of 1890 was an original survey establishing such boundaries and corners. The evidence is ample to support the finding of the court that there was “a Salt Lake City Survey” prior to the survey of 1890, and that the boundaries and corners of the lot and block in question were fixed and established long prior

thereto. True, the field notes and monuments of the old survey showing the boundaries and corners of the lot and block are not now in existence, and were not in existence when the resurvey of 1890 was made. But, when the original landmarks "are no longer discoverable, the question is," said Judge Cooley in a concurring opinion, in the case of *Diehl v. Zanger*, 39 Mich. 601, "where they were located; and upon that question the best possible evidence is usually to be found in the practical location of the lines, made at a time when the original monuments were presumably in existence and probably well known. As between old boundary fences, and any survey made after the monuments have disappeared, the fences are by far the better evidence of what the lines of a lot actually are." And so are the authorities generally. We think it would be a strained and unwarranted construction to hold that under all the circumstances the words "Salt Lake City Survey" in plaintiff's deed referred alone to the lines of the resurvey of 1890, and that the corner of the lot is as shown by that survey, regardless of the fences and other evidence tending to show that it is at a different place. The evidence conclusively shows that the survey of 1890 was not an original survey, but a resurvey for the purpose of determining the lines of the old survey and plat, and that the survey which was made in 1890 of the lot and block in question was not made for the purpose of establishing corners and boundaries which had not been theretofore fixed and established, but was made only for the purpose of determining the location of them as theretofore fixed and established.

In the case of the *City of Racine v. Emerson*, 85 Wis. 80, 55 N. W. 177, 39 Am. St. Rep. 819, the court said:

"A resurvey that changes lines and distances and purports to correct inaccuracies or mistakes in the old plat is not competent evidence in the case. . . . A resurvey must agree with the old survey and plat to be of any use in determining" where the true line is as fixed by the original plat. "Resurveys for the lawful purpose of determining the lines of an old survey and plat are generally very unreliable as evidence of the true lines. The fact, generally known and quite apparent in the records of courts, is that two

consecutive surveys by different surveyors seldom, if ever, agree; and, the greater number of surveys, the greater number of differences and disagreements will occur. . . . Monuments set by the original survey in the ground, and named or referred to in the plat, are the highest and best evidence. If there are none such, then stakes set by the surveyor to indicate corners of lots or blocks or the lines of streets at the time or soon thereafter are the next best evidence. The building of a fence or building according to such stakes, while they were present, become monuments after such stakes have been removed or disappeared, and the next best evidence of the true line."

To the same effect is also the case of *O'Rena v. City of Santa Barbara*, 91 Cal. 621, 28 Pac. 268.

We think the fences erected, maintained, and acquiesced in, as found by the court, became "monuments" indicating the boundaries of the lot, and were sufficient to justify the finding that the northeast corner of the lot is as shown by the fences. Furthermore, and as said by Mr. Freeman in his notes to the case of *Washington Rock Co. v. Young*, 29 Utah, 108, 110 Am. St. Rep. 682, when questions arise as to the true location of a boundary line, the practical location thereof by the persons interested becomes of the highest importance. It is a well-settled rule of law, resting upon public policy, that a practical location of boundaries which has been acquiesced in for a long period of years will not be disturbed. This doctrine has been adopted as a rule of repose with a view of quieting titles and preventing litigation. In the case of *Holmes v. Judge*, 31 Utah 269, 87 Pac. 1009, it was held by this court that "in all cases where the boundary is open, and visibly marked by monuments, fences, or buildings, and is knowingly acquiesced in for a long term of years, the law will imply an agreement fixing the boundary as located, and will not permit the parties nor their grantees to depart from such line." Here Adeline Stoutt, the common grantor of both plaintiff and defendant, and her grantors, for many years recognized and treated the stone wall as the south boundary line of lot 6 the fence on the north as to the north boundary line of the lot, and the fence on the east as the east boundary line of the lot.

She and her grantors for many years occupied the lot so inclosed by the fences and the wall, and claimed the ground up to such boundary lines. The boundaries as so marked were open and visible. It is conceded that the stone wall became a practical location of the south boundary line of the lot, and that it was recognized and acquiesced in as such by Adeline Stoutt and her grantors for many years, beyond which neither she nor her grantees can claim notwithstanding, according to the survey of 1890, the south line of the lot is four or five feet south of the wall. But the fence on the north was also recognized and acquiesced in as the north boundary line of the lot. The pertinent question in the case is not where is the northeast corner of the lot as shown by the resurvey of 1890, but where is it as it was originally fixed and established. On that question the resurvey is itself only evidentiary, and not conclusive. We think the fences and the stone walls are strong evidence of where the lines of the lot actually are and where the location of the northeast corner of the lot is, and amply justified the trial court in locating it where he did in accordance with the fences. By so locating the corner of the lot the plaintiff and the defendant each have three rods of ground, and Fleishman four rods, the amount of ground conveyed to them and called for by their respective deeds of conveyance. If the corner of the lot shall be located as shown by the resurvey, Fleishman and the defendant each have the amount of ground called for by their deeds, but Moyer, the plaintiff, has four or five feet less than that conveyed to him and called for by his deed.

We think the findings of the court are supported by the evidence, and that the judgment entered thereon was proper. The judgment of the court below is therefore affirmed, with costs.

McCARTY, J., and LEWIS, District Judge, concur.

GIBSON v. GEORGE G. DOYLE & COMPANY.

No. 2068. Decided January 4, 1910 (106 Pac. 512).

1. **NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.** Where, in an action for injuries to plaintiff by the fall of a plumber's wrench alleged to have been negligently left on a step-ladder by defendant's employees who were at work on the premises where plaintiff was employed, evidence held not to show such a state of facts that all reasonable men would agree either that defendant's employees were necessarily negligent in leaving the wrench on the ladder, or that plaintiff was free from negligence in opening the door as he did and jarring the wrench off the ladder so that the issues of negligence and contributory negligence were for the jury. (Page 26.)
2. **TRIAL—REQUEST TO CHARGE—MODIFICATION.** Modification of a request to charge, by merely eliminating argumentative matter therefrom, was not error. (Page 26.)
3. **APPEAL AND ERROR—ISSUES — SUBMISSION — RIGHT TO ALLEGE ERROR.** Where plaintiff's counsel requested the court to submit to the jury whether defendant's employees, by whose alleged negligence plaintiff was injured, were subject only to defendant's control and direction, or were under the direct supervision of plaintiff's employer, and the jury found in plaintiff's favor on such issue, plaintiff could not complain of its submission. (Page 27.)
4. **APPEAL AND ERROR—INSTRUCTIONS—PREJUDICE.** That an instruction on an issue, as to which the jury found in plaintiff's favor, was objectionable as on the weight of the evidence, was not prejudicial to plaintiff. (Page 27.)

APPEAL from District Court, Third District; *Hon. M. L. Ritchie*, Judge.

Action by James Gibson against George G. Doyle & Company.

Judgment for defendant. Plaintiff appeals.

AFFIRMED.

Powers & Marioneaux for appellant.

Dey & Hoppaugh for respondent.

APPELLANT'S POINTS.

There was not a scintilla of evidence showing that the plaintiff was guilty of contributory negligence, yet the court charged the jury upon that subject. 'To authorize an instruction it must be relevant. There must be some evidence tending to prove the facts upon which the instruction is based.' (*Kerr v. Lunsford* [West Va.], 2 L. R. A. 678; *Mo. Pac. v. Platzer* [Texas], 3 L. R. A. 642; *Sloan v. Coburn* [Neb.], 4 L. R. A. 470; *Sprague v. Fletcher*, 69 Vt. 69, 37 L. R. A. 840; *State v. Coleman*, 186 Mo. 151, 69 L. R. A. 381; *Richards v. Knight*, 78 Iowa 69, 4 L. R. A. 453; *Markland v. McDaniel*, 51 Kan. 350, 32 Pac. 1114; *Baltimore City Pass. R. E. v. Nugent*, 86 Md. 349, 39 L. R. A. 161.)

RESPONDENT'S POINTS.

Where the question of negligence is the essential fact in the case, and is denied, and the evidence is conflicting, or consists of circumstances from which fair and reasonable inferences may be drawn for or against it, it is within the province of the jury to determine under proper instructions from the court, whether or not the evidence establishes it as the proximate cause of the injury complained of. (*Ewell v. Mining Co.*, 23 Utah 192.) Whether negligence can be inferred from the evidence is for the determination of the court, but whether it ought to be inferred is a question for the jury. (*Patchero v. Judson Mfg. Co.*, 113 Cal. 545; *McCurrie v. Railroad Co.*, 122 Cal. 558.)

Where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury, and this whether the uncertainty arises from a conflict in the testimony or because of the facts being undisputed, fair-minded men will honestly draw different conclusions from them. (*Railroad Co. v. Everett*, 14 Sup. Ct. Rep. 474; *Railroad Co. v. McDade*, 135 U. S. 554; *Anderson v. Daly Mining Co.*, 15 Utah 22, 29.) The plaintiff must have used watch-

fulness to discover the danger in order to avoid the charge of contributory negligence. (*Tuffree v. State Center*, 57 Ia. 538; *Madigan v. Flaherty*, 50 Ill. App. 393; *Beddell v. Berkey*, 76 Mich. 435; *Johnson v. Ramburg*, 49 Minn. 341.)

FRICK, J.

Appellant brought this action to recover damages for personal injuries, which, he alleges, were caused through the negligence of respondent. Appellant, in his complaint, in substance, alleged: That on the 9th day of February, 1907, he was in the employ of Zion's Co-operative Mercantile Institution, a corporation engaged in business in Salt Lake City; that on the date aforesaid respondent was engaged in the plumbing business in Salt Lake City, and, on said date, by two of its employees, was doing some plumbing work for appellant's employer aforesaid in its bottling or drug department, of which appellant was the superintendent; that, in doing said plumbing work, the servants of said respondent were negligent and careless, and negligently suffered and permitted a certain large Stilson wrench to be and remain on a certain stepladder without giving any notice or warning to the appellant that said wrench was left lying on the top of said ladder; that while appellant was engaged in the discharge of his duties, and while ignorant of the presence of said wrench, it fell from said ladder and struck appellant on his head and greatly injured him, to his damage, etc. The defendant answered denying all acts of negligence, and further denied liability for the acts complained of, and, as an affirmative defense, pleaded contributory negligence and assumption of risk. Upon the foregoing issues the case was submitted to a jury, who rendered a verdict for respondent. A judgment was entered accordingly, and appellant presents the case here on appeal.

Appellant filed a motion for a new trial upon the ground, among others, that the evidence was insufficient to sustain the verdict, and assigns the rulings of the court in refusing to grant a new trial upon that ground as error. The par-

ticular reasons urged by appellant's counsel why the court erred in this regard are: (1) That the evidence, as a matter of law, established the negligence of the respondent as charged; and (2) that under the undisputed evidence appellant was not guilty of contributory negligence. In other words, counsel contend that "there is no contributory negligence in this case." Appellant, in substance, testified: That on February 9, 1907, he was in the employ of Zion's Co-operative Mercantile Institution, a corporation, and was discharging the duties of superintendent of its bottling or drug department. That at that time he observed two plumbers at work in the room where he was engaged who were putting in a new sink in place of the old one which they had just removed; that in connection with said work they were also putting in a vent pipe; that this pipe was being put up towards the ceiling of the room over the window; that in putting up the pipe the plumbers were using a stepladder about ten feet high; that there was a carboy filled with ammonia in the room, and appellant told the plumbers, "Don't drop anything, for this is ammonia, and we will get in trouble if it is broken;" that the plumbers were not in the same room with appellant all of the time; that while the plumbers were out of the room appellant had occasion to leave the room where he and the plumbers were at work; that the stepladder used by the plumbers was standing on the floor leaning against the wall and was near the door through which appellant desired to pass; that in attempting to pass through the door appellant, in describing his acts, says: "I pulled the door open, and the corner just jarred the stepladder enough so that the wrench fell off, and it hit me on the head and bounced off. I fell right back against the bench stunned." Appellant also testified that before opening the door he could see that the door, if opened, "was going to come in contact with the ladder." He further stated that he did not know that the wrench was left on top of the stepladder. On cross-examination appellant said: That he had seen the plumbers working in the room on the

day before the accident; that he was told what they were to do; that he knew that they had been working on the ladder with tools; that when they were connecting the pipe he saw them using the wrench; that he did not see the wrench when he was about to pass through the door; but that, "possibly, if I had glanced to the top of the ladder, I could have seen the wrench sticking over;" that the ladder rested against the wall; that there was a small platform on which the wrench was lying; and that appellant did not "think to look on the top of the ladder to see whether there was anything there when I went through the door."

The two plumbers, in substance, testified: That in doing the work aforesaid they used two stepladders, and among other tools the Stilson wrench referred to by appellant; that the wrench weighed four and one-half pounds; that the platform on top of the stepladder was eight and one-half inches wide by eighteen inches long, and the wrench was eighteen inches long; that just prior to the accident one of the plumbers was working on one stepladder and the other was on the other; that is, on the one from which the wrench fell; that at this point the plumber who was on the stepladder on which the wrench was left was required to leave the room and go down into the cellar for a pipe, and the other plumber followed the first one out of the room; that the top of the stepladder inclined towards the wall, and the plumber left the wrench lying on the top of the stepladder against the wall so that the wrench extended beyond the top of the ladder about two inches. The witness then continues the testimony as follows: "When I came back upstairs, this stepladder was across the room. I asked the plaintiff (appellant) what was the matter. He first told me the wrench had fallen on him. . . . He told me he went to move the ladder and got approximately three feet from where it was standing when the wrench fell. . . . He said this was his own fault, that he had no business to move the ladder." The witness further said that the two plumbers were out of the room about ten minutes, during which time the accident occurred. As before stated,

the two plumbers practically agree in their statements, so that it is not necessary to repeat them.

In view of the foregoing facts, is counsel's contention tenable that in view of the evidence, respondent is guilty of negligence as a matter of law, and that 1
appellant, as a matter of law, is not guilty of contributory negligence? We think not. It seems to us that the facts are not of that character upon which all reasonable men would agree either that respondent's employees were necessarily guilty of negligence in leaving the wrench on top of this stepladder under the circumstances, or that appellant was entirely free from all negligence in doing what he did. The question, therefore, was one of fact for the jury, and we are of the opinion that the verdict of the jury finds support in the evidence.

Counsel also urge that the court erred in submitting the question of contributory negligence to the jury, and they excepted to the instruction given by the court on that question. Counsel do not contend that the instruction given by the court on its own motion upon the subject of contributory negligence did not correctly state the law; but they insist that it was error to give the instruction for the reason that the question of contributory negligence, in view of the evidence, was not in the case. From what we have said in passing on the evidence, it necessarily follows that the mere fact of submitting the question of contributory negligence to the jury did not constitute error. Counsel, however, contend that the court erred in modifying a certain 2
request which they asked upon the subject of contributory negligence. We cannot assent to this contention for the reason that the court simply modified counsel's request by eliminating therefrom matters which in their nature were merely argumentative. In so far as the request stated a legal principle, the court gave the charge as requested. After counsel had, however, stated the proposition of law, they followed it by stating the reasons on which the proposition of law rested, and, as this was merely

an argument, the court, in our opinion, did not err in modifying the request in the manner disclosed by the record.

Another assignment relates to the giving of a certain charge in which the court submitted to the jury the question of whether the respondent, as the ultimate employer, was liable for the alleged negligent acts of the two plumbers. There was considerable controversy as to whether the plumbers, in doing the work in question, were or were not under the direct supervision and control of Zion's Co-operative Mercantile Institution. The court, however, submitted that question to the jury in the 3 instruction of which counsel complain. In view of the fact that the record discloses that counsel for appellant themselves requested the court to submit the foregoing question to the jury by requiring them to specially find whether the two plumbers in doing the work referred to, were subject only to the control and direction of respondent, and for the further reason that, as we construe the special finding (and appellant's counsel seem to agree with us in this construction since they do not complain of the finding), the jury found against respondent on that question, the appellant has no cause for complaint.

If we are right in the foregoing conclusions, then counsel's contention that the court erred in giving paragraph 14 of the instructions also fails. The only objection to this instruction is that the court in effect 4 passed on the weight of the evidence offered upon the question which we have just discussed. In view that the jury found in favor of appellant's contention, namely, that the two plumbers were under the direct control and direction of respondent in doing the work before referred to, the giving of the instruction did not constitute prejudicial error, even if it were conceded that the court passed on the weight of the evidence by what was said in the instruction.

In the light of the whole evidence and the instructions given to the jury, we are of the opinion that appellant at

least has suffered no prejudice, nor has he made any such error appear from the record.

The judgment is therefore affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

FEE v. NATIONAL BANK OF THE REPUBLIC.

No. 2049. Decided January 4, 1910 (106 Pac. 517).

1. **BANKS AND BANKING—ACTIONS FOR DEPOSITS—PLEADING—ISSUES.** Where the complaint alleged that defendant bank received on deposit, on April 16, 1908, the sum of \$1077.62, which it agreed to repay on demand, but refused to do so, and the answer alleged that defendant received on the date alleged in the complaint the sum of \$2227.62, and paid to plaintiff on his check on a date thereafter the sum of \$1150, and on a subsequent date paid to him on his check the sum of \$1075, leaving a balance of \$2.62, the only issue was whether defendant had paid to plaintiff or his order the sum of \$1075. (Page 31.)
2. **JUDGMENT—CONFORMITY TO ISSUES—WITHDRAWAL OF ISSUES.** In an action against a bank for a deposit, defendant's counsel, by stating that, if the court found that plaintiff's signature to the canceled check for the amount claimed by plaintiff was genuine, judgment should be entered for plaintiff only in the sum defendant claimed was due, agreed to the elimination of all issues other than the genuineness of the check, and hence judgment was properly given plaintiff for the amount claimed upon finding against the genuineness of the signature. (Page 31.)
3. **APPEAL AND ERROR—PRESENTATION BELOW—ISSUES NOT PRESENTED.** Where the trial court, at appellant's request, passed upon but one issue in rendering judgment, the Supreme Court cannot pass upon other issues not considered, or requested to be considered, below. (Page 32.)
4. **APPEAL AND ERROR—DISCRETION OF TRIAL COURT—EXAMINATION OF WITNESSES—INSPECTION OF DOCUMENTS.** It was within the trial court's discretion to permit a witness to examine an instrument to which his alleged signature was attached before stating whether his signature was genuine; and its ruling will not be disturbed on appeal, in absence of a prejudicial abuse of discretion. (Page 33.)

5. **APPEAL AND ERROR—FINDINGS—CONCLUSIVENESS.** Where the judgment is based upon findings supported by sufficient evidence, the Supreme Court cannot reverse, though it might make different findings from the evidence contained in the record. (Page 34.)

APPEAL from District Court, Third District; *Hon. T. D. Lewis*, Judge.

Action by Dennis Fee against the National Bank of the Republic.

Judgment for plaintiff. Defendant appeals.

AFFIRMED.

Soren X. Christensen and *Howat & Macmillan* for appellant.

Thompson & Gibson for respondent.

FRICK, J.

On May 21, 1908, respondent herein filed his complaint in the district court of Salt Lake County, in which he in effect alleged that on the 16th day of April, 1908, the appellant herein had received from respondent the sum of \$1077.62 for his use, and that said appellant had agreed to pay the same to respondent upon demand, that before the bringing of this action respondent demanded from appellant said sum of money, and that said appellant refused to pay the same to respondent. Appellant answered the complaint, and, after denying respondent's version of the transaction, stated the facts to be substantially as follows: That on the 16th day of April, 1908, appellant received from respondent the sum of \$2227.62, which appellant agreed to pay respondent on demand; "that on the 20th day of April, 1908, the defendant paid to the plaintiff on his check the sum of \$1150; that on the 24th day of April, 1908, the defendant paid to the plaintiff on his check the sum of \$1075; that there is still due to the plaintiff the sum of \$2.62, which the defendant is now, and at all times herein

mentioned has been, ready and willing to pay to the plaintiff on his demand." Upon these pleadings the case was tried to the court without a jury. At the trial the facts adduced on the part of respondent were, in substance, as follows: Respondent produced a deposit slip issued by appellant, from which it appears that respondent, on April 16, 1908, deposited with appellant the sum of \$2230.87; that on April 20, 1908, respondent's check, drawn against said account for \$1150, was presented and duly paid by appellant; that on May 4, 1908, respondent drew another check against said account for the sum of \$1077.62, and presented the same to appellant for payment, and that payment thereof was refused upon the ground that respondent had no money in the bank except the sum of about \$2.60; that at the time respondent presented the second check for payment appellant gave him a statement from which it appeared that respondent had actually deposited with appellant the sum of \$2230.87; that appellant had paid out on checks drawn against said account the sum of \$2228.25, leaving a balance of \$2.62 due respondent. The respondent denied that he drew, or presented, or authorized any one to draw or present for payment, any check or checks drawn against said account, except the check for the sum of \$1150. On cross-examination respondent was shown a certain check to which his name was signed, dated April 23, 1908, for the sum of \$1075, payable to the order of P. H. O'Neill, and which was paid by appellant April 24, 1908. Respondent denied that the signature to the check aforesaid was his signature, and stated, in substance, that the appellant had paid the same without authority. All the checks which appellant claimed were drawn on respondent's account, and which it had paid, and the signature of respondent which he had left with the appellant, as well as other genuine signatures, were admitted in evidence, and all were before the court for comparison. For reasons hereinafter stated we shall not refer to the other evidence, of which there is considerable in the record. Upon substantially the foregoing evidence the court in substance found that the appellant

had received from the respondent for his use the sum of money as alleged in the complaint, that respondent had demanded the same from appellant, and that appellant had refused to pay the same, or any part thereof, to the respondent. As a conclusion of law the court found that the appellant owed respondent such sum of money, and rendered judgment accordingly.

Among other assignments of error the appellant insists that the court erred in finding that appellant had not paid, either to respondent or to his order, the sum of \$1075, the amount of the check dated April 23, 1908. It is contended that this finding is not supported by the evidence, and is contrary thereto. In view of the pleadings the issue between the parties was very narrow. The only 1 question for the court to pass on was whether appellant had in fact paid the respondent or to his order the sum in controversy, namely, the \$1075. It seems that at the trial the question of whether such payment was made was thought to depend entirely on whether the check for \$1075 was genuine or not. This at least was the 2 theory of counsel who represented appellant at the trial, as clearly appears from his own statement, which is incorporated into and made a part of the bill of exceptions. Counsel there said that, if the court found for the appellant "on the question of the genuineness of the signature of Dennis Fee, . . . judgment should be entered in favor of plaintiff in the sum of \$2.62, with interest and costs of suit." Counsel for appellant thus, in effect, told the court that, if the court found that the check for \$1075 was genuine, then appellant was entitled to a credit for said amount on the gross amount deposited which it had admitted it had received from respondent, and under such finding respondent would still be entitled to a judgment for \$2.62, the balance remaining on deposit with appellant. Counsel thus asked the court to make appellant's liability depend upon the genuineness of the signature to the check, and upon nothing else. The court thus eliminated all other questions, and, having found that the check was not genuine, could

not have found otherwise than he did, namely, that appellant had not paid respondent the \$1075, because if it was not paid on that check, there is no pretense that it was paid at all. The only question, therefore, is: Is there any substantial evidence in the record in support of the finding that counsel attacks?

We think that, in view of the evidence and the circumstances to which we have referred, it is clear that there is substantial evidence in support of the finding that appellant did not pay respondent on his demand the sum of \$1075 represented by the check aforesaid. It is true that there is considerable evidence in the record which, as appellant contends, tends to show that respondent authorized the drawing and issuing of the check to which respondent's name was signed without his authority, as the court found. There is also some evidence tending to show that respondent was guilty of a lack of diligence in failing to notify appellant not to honor or pay the check dated April 23, 1908.

Appellant now urges that we pass upon those ques- 3
tions, and insists that the findings and judgment ought to have been in favor of appellant, in view of the state of the evidence upon those questions. These matters were, however, not submitted to the trial court. As we have seen, the pleadings presented but one issue, and that was whether appellant had on respondent's demand paid him the sum of \$1075. The amount of the deposit and the fact that one check for \$1150 had been paid were admitted. If we should assume, therefore, that under the issues presented by the pleadings the court should have passed upon two propositions (1) whether the check was genuine—that is, whether it was signed by respondent—and (2) if not signed by him, whether he nevertheless permitted the same to be issued, presented for payment, and paid, when he could have prevented such a result, yet, in view of the only question which counsel for appellant asked the trial court to pass on, and which it did, we are not authorized to pass upon the second proposition stated above, for the reason that the trial court did not pass upon it and was not asked to do so, but the

court was asked to and did make the liability of appellant depend upon the genuineness of the signature to the check dated April 23, 1908. If counsel had no confidence in the evidence adduced in support of the second proposition, why should the court have considered it? The findings responded to the issues as presented by the pleadings, and, in view of counsel's statement to the court, they also covered all questions raised by the evidence. This is all appellant can insist upon, and this is especially so in view of the fact that appellant did not request any findings upon the collateral questions which it now urges should be passed upon. The most that can be said with regard to the appellant's contentions relative to the findings is that appellant has changed counsel, and that it has also changed the theory upon which the case was presented to the trial court. What we have said with regard to the finding already discussed applies with equal force to the other findings attacked.

Another assignment relates to an alleged error committed by the court in permitting the respondent, while testifying as a witness in his own behalf, to examine the whole writing before he was required to answer whether 4 or not it was his signature that was attached thereto.

Counsel contend that the court should have required the witness to state whether this signature was his or not from a mere inspection of the signature, and should not have permitted the witness to examine or inspect the whole writing before requiring him to answer the question. We think the procedure of examining witnesses under the circumstances above detailed is within the sound discretion of the trial court. There is nothing made to appear in this case from which we can determine that the trial court abused the discretion vested in it. The assignment, therefore, cannot be sustained. Further, we are clearly of the opinion that no prejudicial error is made to appear. What we have said with regard to the last assignment applies with equal, if not greater, force to all other assignments relating to the admission or exclusion of evidence.

We remark, in conclusion, that even though we were inclined to arrive at a different conclusion from that arrived at by the trial court from a mere inspection of the record, this would not be enough to authorize 5 us to reverse the judgment, in view that it is based upon findings which are supported by sufficient evidence.

The judgment is affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

FERRY v. FOWLER.

No. 2046. Decided January 5, 1910 (106 Pac. 506).

PUBLIC LANDS—RESERVATIONS—BOUNDARIES. Where the federal government has by an official survey fixed the boundaries of an Indian reservation pursuant to proclamation by the President, and rights have been acquired thereunder by the issuance of patents to lands outside of the boundaries as fixed by the survey, the patents are valid as against any subsequent survey, including such lands within the reservation. (Page 38.)

APPEAL from District Court, Fourth District; *Hon. J. E. Booth*, Judge.

Action by Edward P. Ferry, by William Montague Ferry, and another, his general guardians, against R. E. Fowler.

Judgment for plaintiff. Defendant appeals.

AFFIRMED.

F. J. Gustin and *Zane & Stringfellow* for appellant.

Richards, Richards & Ferry for respondent.

APPELLANT'S POINTS.

In determining boundaries of land courses and distances yield to monuments or natural objects. The reason of the

rule is that it is the intention of the grant to convey the land actually surveyed and mistakes in courses or distances are more probable and more frequent than marked trees, mountains, rivers or other natural objects capable of being clearly designated and accurately described. (*McIvers Lease v. Walker*, 4 Wheat. [U. S.] 444, 17 Law Ed., 445; *White v. Williams*, 48 N. Y. 344; *Beldon v. Seymour*, 8 Conn. 19; *Howe v. Bass*, 2 Mass. 380; *Walrod v. Flanigan*, 75 Ia. 365; *Hughes v. Cawthorn*, 35 Fed. 248; *Ogilvie v. Copeland*, 145 Ill. 98.) The intention of the United States government was to grant to the Indians and reserve to the United States the land lying on each side of the Uintah river in Utah Territory, extending to "the crest of the first range of contiguous mountains on each side." When boundaries of land are fixed by known and unquestionable monuments, although neither courses nor distances nor the computed contents corresponds, the monuments must govern. (*Pernam v. Wead*, 6 Mass. 131.) An executive order by the President of the United States by which is set apart as a reservation for certain specified Indians a certain scope of country has the same effect as a treaty would have had with the Indians for the same purpose, and there can be no doubt of the power of the President to reserve such lands for the use of the Indians. (*McFadden v. Mountain View Ming. & Mill'g Co.*, 97 Fed. 673; *John Campbell Appeal*, 6 Land Dec. 317; *W. N. Braden Appeal*, 1 Land Dec. 101; *Reservation*, 1 Land Dec. 702-3. This purpose and the stipulation of the United States could not be defeated by the action of any officers of the land department. (*U. S. v. Carpenter*, 111 U. S. 356; Lindley on Mines, sec. 183; *Mono Fraction Lode Mining Claim*, 31 Land Dec. 121; *Acme Cement & Plaster Co.*, 31 Land Dec. 125; *Gibbs v. Anderson*, 131 Fed. Rep. 39; *Instructions of the Sec. of Int.*, 31 Land Dec. 178.) A patent may be collaterally impeached in any action and its operation as a conveyance defeated by showing that the department had no jurisdiction to dispose of the land; that is, that the law did not provide for selling it, or that it had been reserved for sale,

or dedicated to special purposes, or had been previously transferred to others. (2 Lindley on Mines, sec. 777 [subd. 4]; 1 Lindley on Mines, subd. 4, sec. 175 and cases cited; *Deffebach v. Hawkes*, 115 U. S. 392; *Davis v. Weibold*, 139 U. S. 509; *Doolan v. Carr*, 125 U. S. 618; *Larkin v. Dooly*, 58 Fed. 333; *Parleys Park S. M. Co. v. Kerr*, 130 U. S. 261; *Hardin v. Jordan*, 140 U. S. 371.)

RESPONDENT'S POINTS.

The definite boundary lines of a United States government Indian reservation are established by survey under the direction of the Interior Department of the Government, and its action is conclusive and final and cannot be attacked collaterally.

Individuals have a right to rely upon a survey and acquire vested rights under it.

No subsequent corrective survey can affect a primary survey to the extent of interfering in any way with vested property rights acquired under the primary survey, no matter how inaccurate the primary survey may have been.

The courts will protect the vested rights of individuals acquired under the primary survey. (R. S. of U. S., sec. 2396, sub. 2; *Cragin v. Powell*, 128 U. S. 566; Lindley on Mines, secs. 185-192, and cases cited; 27 Cyc. 546; *Re Fort Maginnis*, 1 L. D. 552; *Washington Rock Co. v. Young*, 29 Utah 108; *Noonan v. Caledonian G. M. Co.*, 121 U. S. 393; *Kendall v. San Juan S. M. Co.*, 144 U. S. 658; Snyder on Mines, sec. 179.)

STRAUP, C. J.

This is an action in ejectment. The plaintiff alleged that he was the owner and entitled to the possession of certain mining claims known as the "Tykoon Consolidated Mining Claims," and designated as lots numbers 34 to 43, inclusive, situate in Wasatch County, this state, and that the defendant wrongfully took possession of them, and ejected the plaintiff therefrom. The defendant denied that his posses-

sion was wrongful. He alleged that when the plaintiff entered and located the claims in 1880, and when he obtained his patent for them from the government of the United States in 1891, they were within an Indian reservation, and were not subject to location or sale, and that the plaintiff's location and patent were therefore void; that in 1905 the unallotted lands of the reservation were restored to the public domain, and in 1907 the defendant located the ground as the Danville group of claims; and that he claimed possession of them by virtue of such location. The principal question presented involves the boundary line of the reservation. It is claimed by the plaintiff that the Tykoon claims which were located by him, and for which he obtained a patent, were without the reservation. The defendant claimed the contrary. Upon the evidence adduced by both parties the court found in favor of plaintiff, and adjudged that the plaintiff was the owner and entitled to the possession of the Tykoon claims, and that the defendant surrender possession of them to the plaintiff. From such judgment, the defendant has prosecuted this appeal.

The judgment is assailed principally upon the alleged ground that the evidence conclusively shows that the Tykoon claims were within the reservation. It is made to appear that in 1861 the Secretary of the Interior recommended that the President of the United States issue his proclamation ordering "that the entire valley of the Uintah River, within Utah Territory, extending on both sides of said river to the crest of the first range of contiguous mountains on each side, be reserved to the United States and set apart as an Indian reservation." The President thereupon in that year by proclamation, established the reservation as recommended by the Secretary. In 1884 an official survey, under the direction of the Interior Department, was made by Daniel C. Oakes and Myrum P. Bennett, Jr., United States surveyors, which is known as the "Oakes & Bennett Survey," and which was approved by the Department of the Interior as the boundary of the reservation. The maps of that survey were certified to as being conformable to the

field notes of the survey on file in the office of the Interior Department. The field notes and maps of that survey were put in evidence. According to that survey, the Tykoon claims were wholly outside and about three miles west of the reservation. In the year 1891 the government of the United States issued a patent to the plaintiff for the Tykoon claims. In 1902, by an Act of Congress, the unallotted lands in the reservation were ordered restored to the public domain on the 1st day of October 1903. That time was extended by acts of Congress until not later than the 1st day of September, 1905. In July, 1905, the President of the United States issued a proclamation restoring the unallotted lands of the reservation to the public domain, "excepting . . . such mineral lands as may have been disposed of under existing laws," and declared such unallotted lands open to entry, settlement, and disposition on and after the 28th day of August, 1905. In 1903 Arthur H. Brown, who "had a commission as agricultural surveyor," together with others, surveyed the south, southeast, and west boundaries of the reservation. According to that survey, which is known as the "Brown Survey," and which was also approved, the greater portion of the Tykoon claims were within the reservation. But when the plat of that survey which shows the patented claims to be within the reservation, was approved, "the area of those claims were" by the Interior Department "excluded from the public land and from being entriable." It is, however, urged by the appellant that, though the patented claims were excluded from the public domain, the department nevertheless could not lawfully so exclude them. It is not necessary to inquire into the questions whether such exclusion by the department was inconsistent with the proclamation of 1905, or whether the department had the authority to so exclude the claims from the rest of the unallotted lands restored to the public domain. There is evidence to show that the boundary line of the reservation was fixed and established by the official survey of 1884, which was approved by the Interior Department. The survey was an original or primary 1

survey. Vested property rights which were acquired under it cannot be interfered with by a subsequent corrective survey or a resurvey. (*Cragin v. Powell*, 128 U. S. 691, 9 Sup. Ct. 203, 32 L. Ed. 566, 5 Cyc. 914,)

This doctrine is not disputed by appellant. He, however, insists that the proclamation of 1861 itself fixed the boundary of the reservation by reference to a fixed monument, "the crest of the first range of contiguous mountains on each side," and that the evidence without dispute shows that the Tykoon claims are within the "crest of the first range of contiguous mountains," and as shown by the Brown survey. In the first place, we do not think by the use of the language contained in the proclamation of 1861 it was intended to fix an exact or definite boundary. In the next place, though all that is claimed for by appellant were conceded, it but argues that the original or primary survey is incorrect. It is not the question now whether the original survey or the Brown survey is the more accurate. It is not disputed that the survey of 1884 was an official and original survey made under the direction of, and approved by, the Interior Department, and that, according to that survey the Tykoon claims are more than three miles from the reservation. Whether that survey correctly established the boundary of the reservation with reference to the "crest of the first range of contiguous mountains," or whether it was inaccurate in other particulars, can make no difference, so far as affecting vested property rights which were acquired under it. As to all such rights that survey, right or wrong, became the boundary line of the reservation. Said Judge Cooley in a concurring opinion in the case of *Diehl v. Zanger*, 39 Mich. 601:

"Nothing is better understood than that few of our early plats will stand the test of careful and accurate survey without disclosing errors. This is as true of the government surveys as of any others, and, if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities. Indeed, the mistakes that must follow would be simply incalculable, and the visitation of the surveyor might well be set down as a great public calamity."

The fact, generally known and quite apparent in the records of courts, is that two consecutive surveys by different surveyors seldom, if ever, agree; and, the greater number of surveys, the greater number of differences and disagreements will occur. (*City of Racine v. Emerson*, 85 Wis. 80, 55 N. W. 177, 39 Am. St. Rep. 819.) This is especially true in this mountainous country where considerable difficulty is encountered in correctly running lines, and where the direction of lines and the location of points are, and sometimes can only be, estimated or calculated. In ascertaining and determining the crest of mountains as rugged and irregular as those in and about the reservation, it is not unlikely that two surveyors will disagree, and that a third may declare that both are wrong. We think that when the government of the United States, by an official and original survey, which was approved by it, fixed and established the boundaries of the reservation, and rights have been acquired under that survey, the lines of such survey, where they have been run and can be found, constitute the true boundary which cannot be departed from or made to yield to subsequent or resurveys which are in conflict with them. That the boundary of the reservation as found by the court is as is shown by the 1884 or original survey is not questioned; and as the plaintiff's claims, according to such boundary, are wholly without the reservation, we think the judgment of the court below ought to be affirmed, with costs.

Such is the order.

FRICK and McCARTY, JJ., concur.

GROW v. UTAH LIGHT & RAILWAY COMPANY.

No. 2070. Decided January 5, 1910 (106 Pac. 514).

1. **TRIAL—INSTRUCTIONS—ERROR CURED BY OTHER INSTRUCTION.** In an action for injuries from a collision with a street car, an instruction that the burden was on plaintiff to prove by a preponderance of the evidence that he was injured by the negligence of defendant, and that, if he was so injured without fault on his part, he was entitled to a verdict, was not erroneous as casting upon plaintiff the burden of proving that he was free from contributory negligence where the court also charged that contributory negligence constituted a defense, and that the burden of establishing it by a preponderance of the evidence was on defendant. (Page 45.)
2. **STREET RAILROADS—INJURIES TO TRAVELER—INSTRUCTIONS.** In an action for injuries from a collision with a street car, it was not error to charge that it was the duty of the plaintiff before crossing or going upon the tracks to use his senses as a person of reasonable prudence and ordinary intelligence would do, under like circumstances, for the purpose of ascertaining whether or not a car was in sight or hearing upon the track.¹ (Page 46.)
3. **STREET RAILROADS—OPERATION—LIABILITY FOR INJURIES—INSTRUCTIONS.** Where, in an action for injuries from a collision with a street car, it appeared that plaintiff drove upon defendant's tracks, it was not error to refuse to instruct that it was not negligence as a matter of law for a person to fail to look and listen before driving upon a street car track, unless there is some circumstance apparent that would make it ordinarily prudent to do so. (Page 47.)
4. **TRIAL—INSTRUCTIONS—EXCEPTIONS.** When an instruction contains several propositions, some of which are confessedly sound, an exception to it as a whole will not be considered.² (Page 48.)

APPEAL from District Court, Third District; *Hon. M. L. Ritchie*, Judge.

Action by Otto S. Grow against the Utah Light & Railway Company.

¹ *Spiking v. Railway & P. Co.*, 33 Utah, 313, 93 Pac. 838.

² *Farnsworth v. Union Coal Co.*, 32 Utah, 112, 89 Pac. 74.

Judgment for defendant. Plaintiff appeals.

AFFIRMED.

McGurrin & Gustin and *Powers & Marionaux* for appellant.

P. L. Williams, George H. Smith and *Jno. G. Willis* for respondent.

FRICK, J.

Appellant brought this action to recover damages for personal injuries alleged to have been occasioned by the negligence of the respondent. The alleged injuries were caused by a collision between a street car of respondent and appellant's team and wagon on one of the streets of Salt Lake City. The appellant alleged in his complaint that the negligence consisted in operating a street car "at a high and immoderate rate of speed," in failing to keep "the car well under control," in failing "to stop the car so as to afford plaintiff (appellant) an opportunity to turn out from the tracks" of respondent, and in failing "to adopt and use a system of signals and warnings whereby plaintiff could have been warned of the approach of the car," and thus could have avoided the collision. In its answer the respondent denied all acts of negligence, and as an affirmative defense pleaded contributory negligence. It is not practical, neither is it necessary to set forth the evidence, except to state that it tended to prove that appellant, when the collision occurred, was driving with a team and loaded wagon on one of the streets of Salt Lake City in a southerly direction; that at the place where he was then driving the respondent had laid and was operating a double track; that appellant was driving on the west side of said tracks upon a space which was sixteen feet and three inches wide, measured from the most westerly rail to the curb line on the west side of the street; that in passing south along said driveway appellant encountered a peddler's or huckster's

wagon which was standing on said sixteen-foot driveway near or along the curb; that, in attempting to pass around said wagon, appellant drove on to or near the street car track, when the car, which was then passing south over the street car track at that point, collided with appellant's wagon, and he was thrown to the ground and injured.

The questions for the jury to pass on were whether the employees in charge of the street car exercised ordinary and proper care in operating the street car at the time and place; whether they, in the exercise of such care, did all that, under the circumstances, they were required to do in order to avoid the collision; whether the appellant himself was exercising ordinary care for his own safety, and whether or not he, by his own acts or omissions, directly contributed to the injury of which he complains. The jury, after considering the evidence, returned a verdict in favor of respondent, upon which the court entered judgment, and hence this appeal.

The state of the evidence is such that the jury would have been justified in finding a verdict for either party. The principal assignments of error, therefore, relate to the instructions. In this regard counsel for appellant assert that the court erred both in charging the jury and in refusing to give certain requests offered by them. After stating the issues as contained in the pleadings, the court charged the jury as follows:

"In order to recover in this action, the burden is on the plaintiff to prove by a preponderance of the evidence that on or about the 3d day of July, 1906, he was injured by reason of the carelessness or negligence of the defendant, and that said carelessness or negligence consisted of some one or more of the acts or omissions on the part of the defendant alleged in the complaint as negligence; and, second, the extent of such injury, if you find that he was injured, and the amount of the damages resulting therefrom, if any. If you find from the evidence that the plaintiff was so injured by the negligence of the defendant, as alleged, without fault on his part, your verdict should be for the plaintiff. If you find from the evidence that the weight of the evidence upon any of these issues is in favor of the defendant or that it is equally balanced, you should find the issues for the defendant."

Appellant duly excepted to the giving of this instruction, and now insists that the court committed prejudicial error in so charging the jury. It is earnestly contended that the court, in effect, told the jury in the foregoing instruction that, before the appellant was entitled to recover, he had to establish by a preponderance of the evidence "that the injuries arose from the negligence of defendant without fault upon the part of the plaintiff." In other words, it is insisted that by this instruction the burden of showing that appellant was free from contributory negligence was cast upon him instead of placing the burden upon the respondent of establishing such negligence. This claim is based upon the phraseology of the second sentence contained in the instruction, which is as follows: "If you find from the evidence that the plaintiff was so injured by the negligence of the defendant, as alleged, without fault on his part, your verdict should be for the plaintiff." The contention is that the phrase "without fault on his part" casts the burden of proof with respect to contributory negligence upon the appellant. From a mere cursory reading of the whole instruction, it seems manifest that such was not the intention of the court. But, considering the instruction as a whole, is the usual and ordinary meaning of the language used by the court open to such a construction? In the first sentence of the instruction the jury were told in apt language that, in order to recover, the appellant must prove by a preponderance of the evidence that his injuries were caused by the negligence of respondent. In the second sentence the court told them that, if they found that appellant was so injured "without fault on his part," then they should find for appellant. "If you find . . . that the plaintiff was so injured" clearly referred to what was contained in the preceding sentence, namely, that the injury must have resulted from respondent's negligence. The phrase "without fault on his part" did not refer to either the quantum or burden of proof, but, set off by commas as it is, was merely a parenthetical or precautionary statement by the court by which it was intended to direct the jurors' attention to the fact

that there were other issues to be considered. If the court had told the jury that under the circumstances stated in the instruction they should find for appellant "unless he was guilty of contributory negligence as hereinafter defined," we think that no one would now insist that the instruction was erroneous, or that it referred to the burden of proof upon the issue of contributory negligence. Yet, in effect, this is just what the language of the court implies. Just preceding the instruction in question the court had informed the jury that the respondent in its answer claimed that appellant's alleged injuries were caused by his own negligence; that is, that they were caused by his own fault. In an instruction following the one complained of the court, in apt terms, of which no complaint is made, in substance told the jury that contributory negligence constituted a defense; that the burden of establishing it was upon the respondent; and that, in order to defeat a recovery by appellant, the respondent must establish such negligence by a preponderance of the evidence adduced upon that subject. Keeping in mind, therefore, the court's precedent statement of the issues, the language contained in, and the manner of 1 statement in the instruction complained of, the succeeding instruction, which is entirely devoted to the subject of contributory negligence and by whom and how it had to be established, we are clearly of the opinion that the criticism of counsel with respect to the instruction above set forth is plausible rather than sound, and ought not prevail.

Nor is the contention sound that what was said in the succeeding instruction was in conflict with what the court had told the jury in the one complained of. Properly interpreted and applied, the statements contained in the two instructions were not in the least conflicting, but were, in fact, harmonious. It might with as much reason be contended by respondent, if the verdict had been against it, that, if the court had omitted the qualifying phrase complained of, the instruction was an unqualified direction to the jury to find for the plaintiff, regardless of his contributory negligence, and that the instruction with respect to contributory negli-

gence was in conflict with it. We are quite safe, we think, in asserting that, if such a contention were made, counsel for appellant would not concede its soundness, and we think no one else would do so. If we should reverse cases upon grounds as unsubstantial as those urged against the instruction in question, we should have to reverse nearly every case where the court was required to direct the jury upon a multiplicity of issues. In such cases counsel would always be able to find some statement in one instruction which could be said to be in apparent conflict with some other statement contained in another instruction, and thus we would be required to overturn the verdicts of juries upon mere technical grounds. This we are neither authorized nor disposed to do.

Another assignment relates to a part of instruction No. 18 in which the court, in speaking of the traveler's duty while passing along or in crossing a street car track, among other things, told the jury that, "before crossing or going upon the track, he must make use of his senses as a person of reasonable prudence and ordinary intelligence would do under like circumstances for the purpose of ascertaining whether or not a car is within sight or hearing upon the track." It is contended that in using the foregoing language the court in effect told the jury that, where 2 one intended to go on to or cross a street car track, before doing so he must "look and listen." It is contended that this is not the law, and is contrary to what we said in the case of *Spiking v. Ry. & P. Co.*, 33 Utah 313, 93 Pac. 838, where we in effect held that the doctrine that it ordinarily is the duty of a traveler, before attempting to cross a steam railway track, to "stop, look and listen," does not apply to street car tracks in cities. A mere cursory inspection of the instructions given by the court in this case show that the court aimed to follow the law as declared in the *Spiking Case*, *supra*, and we think it did so. At any rate, after accurately defining what would constitute negligence, the court submitted the whole matter to the jury, and left it for them to say whether the respondent or the appellant was guilty of negligence or if both were guilty, and, if so,

whether the negligence of respondent or that of the appellant was the proximate cause of the injuries complained of. Moreover, if the whole instruction now under consideration is considered and applied to the evidence as the same is made to appear from the record, and is construed in connection with other instructions, the jury could not have been misled by the language used by the court.

It is further contended that the court erred in refusing the appellant's request to charge with respect to the duty of the motorman in approaching the huckster's wagon to which we have referred. While the court did not instruct the jury in the precise language in which appellant's request is couched, yet we are clearly of the opinion that the court correctly informed the jury what the duties of the motorman were in passing along a street under the circumstances disclosed by the evidence. In view of the whole evidence and all the instructions when considered together, we cannot see wherein appellant has any cause for complaint with respect to the court's instructions upon the subject covered by the request in question.

Appellant also predicates error upon the refusal of the court to give his request wherein the jury were directed that "it is not negligence as a matter of law for a 3 person to fail to look and listen before driving upon a street car track, unless there is some circumstance apparent that would make it ordinarily prudent to do so." We have already stated the court left it to the jury to say what, if anything, either party did or omitted to do in view of all the circumstances surrounding them. Counsel contend, however, that the foregoing request should have been given because the court had in effect told the jury in a prior instruction that before going upon a street car track a person must "look and listen." If this were conceded, it would only amount to this: That the direction in the request would have been in conflict with a prior instruction. As we have already shown, the court did not direct the jury that in passing along or in crossing a street car track a traveler must stop, look and listen to ascertain whether there is a car near

or approaching. All that the court said was that a traveler must exercise ordinary care for his own safety, and to that end must make use of his senses. The court in various instructions and in different language followed the rule adopted by us in the *Spiking Case, supra*, and counsel do not contend that the doctrine laid down in that case is not sound. Indeed, their only contention is that the court failed to follow the doctrine of that case, but we think that counsel's contention in that regard cannot be sustained.

Counsel offered two other requests, designated as "B" and "C," which were refused, and they now urge that such refusal constituted error. Those two requests in somewhat different language referred to the same matters that we have already considered. If we are right in the conclusions reached upon the matters hereinbefore discussed, then the court committed no error in refusing to give said requests or either of them.

Finally, it is contended that the court erred in giving instruction numbered 20. The exception is to the instruction as a whole, and as it contains several 4 propositions, some of which are confessedly sound, the exception under the rule laid down in the case of *Farnsworth v. U. P. Coal Co.*, 32 Utah 112, 89 Pac. 74, and the cases there cited, is unavailing.

We have refrained from setting forth full copies of either the instructions criticised or the requests of counsel other than those here set forth, because it is impracticable to do this within the limits of an opinion. The instructions given by the court are divided into twenty paragraphs and cover eleven typewritten pages of legal cap, while the requests of counsel cover several pages more. If, therefore, we had copied all the paragraphs to which counsel excepted in whole or in part, we should also have been compelled to copy all of the other instruction which in some way related to the subject in order to show that counsel's criticisms were not well founded. This would have been true, also, with respect to the requests of counsel which were refused by the court. Without copying the whole instructions comparisons could

not be made. As a general rule, such comparisons must be made for the purpose of determining whether the court erred either in giving certain instructions or in refusing requests offered by counsel, and both the instructions and requests in this case come squarely within the general rule. While it would not have constituted error, perhaps, to have given some of appellant's requests, yet the instructions given by the court covered fully those facts, and upon the whole were fair, and not open to just criticism. While the jury would have been justified in finding for appellant, they, upon both the law and the facts, were also authorized to find for the respondent. This being so, and there being no prejudicial errors in law, we have no alternative except to affirm the judgment, which is accordingly done, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

PASSOW et al. v. EMERY, Sheriff.

No 2090. Decided January 5, 1910. On Application for Rehearing, February 11, 1910 (106 Pac. 935).

1. **SALES—CONDITIONAL SALES—RIGHTS OF THIRD PERSONS.** On a conditional sale of personalty retaining the title in the seller, third persons cannot acquire any interest in the property from the buyer by reason of his possession adverse to the seller without the seller's consent. (Page 59.)
2. **CHattel MORTGAGES—DISTINGUISHED FROM CONDITIONAL SALE.** A contract between plaintiffs and L. recited that he had ordered certain described chattels for \$1,187, terms \$650 cash balance in twelve payments, monthly, thereafter, with interest, payments to be secured by a mortgage and insurance on the goods; it being understood that title should remain in plaintiffs until the notes and chattel mortgage were executed by L., or, if the purchase was a cash transaction, then the title should remain in plaintiffs until they received the price in cash. L. paid \$650 with the order, and on receipt of

the goods entered into a contract, reciting that plaintiffs had leased to him the same property for twelve months, L. to pay as rental \$1,187, \$650 at the execution of the lease and \$45 on the first of each month until the whole amount of the rental should be paid, the last payment to be \$42; that L. should keep the property in a specified building, pay interest on all unpaid rent, keep the property insured, and on default, plaintiffs to be entitled to the possession of the property. To such contract was appended an option, by which plaintiffs for one dollar granted to L. the right to purchase the property leased for one dollar to be paid by L. on January 1, 1909, but to be void unless the rentals should be paid as provided in the lease, and all the conditions performed by L. Held that, no chattel mortgage having ever been given, such instruments constituted, when construed together, a conditional contract of sale, and showed an intention by plaintiffs to retain title until the goods were paid for, and hence, prior to that time, L.'s creditors could obtain no interest in the property adverse to plaintiff's by attachment or otherwise, on the theory that the instruments constituted a chattel mortgage, and that there had been a failure to comply with Comp. Laws 1907, sec. 150, subds. 2, 3, regulating chattel mortgages. (Page 60.)

Appeal from District Court, Third District; *Hon. M. L. Ritchie*, Judge.

Action by Louis Passow and another against Frank C. Emery, as sheriff of Salt Lake County.

Judgment for defendant. Plaintiff appeals.

REVERSED, WITH DIRECTIONS.

D. B. Hempstead for appellants.

Stephens, Smith & Porter for respondent.

APPELLANT'S POINTS.

The transaction constituted a preliminary conditional contract of sale, title to remain in vendor until payment. Such contracts have always been upheld by the Supreme Court of Utah. (*Russell v. Harkness*, 4 Utah 197; *Turnbow v. Beckstead*, 25 Utah 468, at page 477; *Hirsch v. Steele*, 10

Utah 18; *Detroit Heating Co. v. Stevens*, 16 Utah 177; *Lippincott v. Rich*, 19 Utah 140; *Lippincott v. Rich*, 22 Utah 196; *Standard Laundry v. Dole*, 22 Utah 311; *Freed Furn. & Car. Co. v. Sorensen*, 28 Utah 419.) The case of *Russell v. Harkness*, supra, was affirmed by the Supreme Court of the United States. (See *Russell v. Harkness*, 118 U. S. 663.) That leases of personal property similar in form to the foregoing are upheld either as leases or as conditional sales, see *Gerow v. Castello*, 19 Pac. Rep. 505 [Colo.] If plaintiff's exhibit 2 cannot be construed to be a lease, it can only be construed to be a conditional sale contract of the property described therein; it cannot be construed to be a chattel mortgage. (6 Ency. of Law, 2 Ed., pp. 447-8; 1 Mechem on Sales, sec. 569-573; *Hayes v. Jordan*, 9 L. R. A. 373 [Ga.] and cases cited in notes; *Hineman v. Matthews*, 10 L. R. A. 233 [Pa.] and cases cited in notes; *Tufts v. D'Arcambal*, 12 L. R. A. 446 [Mich.] and cases cited in notes.) A provision in the contract that the purchaser shall execute a mortgage on the property to secure the payment, does not make the sale absolute unless the mortgage be in fact executed. (*McRea v. Merrifield*, 48 Ark. 160; 1 Mechem on Sales, sec. 583; Hammond on Chattel Mortgages, sec. 4, pp. 9-10; *Nichols v. Ashton* [1891], 155 Mass. 205.)

RESPONDENT'S POINTS.

In case of doubt as to whether the transaction is a conditional sale or a mortgage equity will construe it to be a mortgage. (*Mining Co. v. Baker*, 23 Fed. 258; *Niggler v. Maurin*, 24 N. W. 369; *Rogers v. Burris*, 9 N. W. 786; *D. A. Tompkins Co. v. Oil Vompany*, 137 Fed. 625). This exhibit 2 is nothing more than an instrument securing the payment of the notes which represent the debt and it is consistent with the provisions of the original agreement. (Exhibit 1). (*Haryford v. Davis*, 102 U. S. 235; *Chicago Ry.*

Equipment Co. v. Bank, 136 U. S. 268; *McGurkey v. Toledo & Ohio Ry.*, 146 U. S. 536.) It is settled law that if a security for money is intended, that security is a mortgage, though it may not bear upon its face the form of a mortgage. (*Singer Mfg. Co. v. Smith*, 19 S. E. 132, construing a lease to be a mortgage). The omission to demand the security at the time of delivery, or at the time of the giving of the notes is sufficient to preclude the plaintiff from claiming that the transaction from that time was on condition. (*Brundage v. Camp*, 21 Ill. 329; *M. C. R. R. v. Phillips*, 60 Ill. 191; *Husted v. Ingraham*, 75 N. Y. 251). In the leading case of *Parker v. Baxter*, 86 N. Y. 586, it was held where goods sold for cash or notes are delivered to the purchaser without the cash or notes being given or demanded at the time, the presumption is that the condition is waived, and that a complete title vests in the purchaser. (*Osborn v. Gantz*, 60 N. Y. 540; *Hennequin v. Sands*, 25 Wend. 639; *Gowan v. Kehoe*, 71 Ill. 66; *Oester v. Sitlington*, 115 Mo. 247; *Farlow v. Ellis*, 15 Gray 229; *Berlin Machine Works v. Trust Co.*, 61 N. W. 1131).

FRICK, J.

Appellants brought this action against respondent, as sheriff of Salt Lake County, to recover the value of certain personal property, of which they claim to be the owners, and which they allege the respondent converted to his own use. Respondent in his answer, after making certain denials, as an affirmative defense alleges that in taking the property in question he acted under process of law issued by a court of competent jurisdiction, and took and sold the same on an execution issued upon a valid judgment, etc. Appellants filed a reply, in which they, in effect, deny all the affirmative matter contained in the answer. The case was tried to the court without a jury, and the court found the issues in favor of respondent, and entered judgment accordingly. Appellants present the record for review on appeal.

The material facts upon which the legal questions presented by respective counsel arise, briefly stated, are as follows:

The appellants, at the time of the transaction herein referred to, were copartners engaged in business in Chicago, Illinois, under the firm name of Charles Passow & Sons, having a branch office at Salt Lake City, where they were represented by an agent. On December 16, 1907, one Joseph Leautaud ordered certain pool and billiard tables and other articles from appellants by a written order, which, so far as material here, is as follows:

"Mr. Joseph Leautaud, No. 29, Market street of the town of Salt Lake, State of Utah, has this, the 16th day of December, 1907, contracted for and ordered of Charles Passow & Sons, Chicago, Illinois, through their salesman, W. H. Seber, the following mentioned goods. This contract subject, however, to the approval of the company. [Describing chattels.] Goods to be shipped on or about at once, to Mr. Joseph Leautaud, town of Salt Lake, State of Utah, subject to delay on account of strikes or other unforeseen accidents, via —, and the freight payable by the purchaser. Settlement to be made on arrival of goods at station, at office of Charles Passow & Sons. Price, (\$1,187.00) eleven hundred and eighty-seven dollars. Terms, (\$650.00) six hundred and fifty dollars, cash. Balance in twelve payments of \$44.75 each, payable in the 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 following consecutive months with interest at the rate of 8 per cent. per annum. Payments to be secured by first mortgage and fire insurance on said goods above described, expense of which is to be paid by the purchaser. It is understood and agreed that the title to the property described in this contract shall remain with Charles Passow & Sons until the notes and chattel mortgage are fully executed by the purchaser. Or if the purchaser herein is a cash transaction then, and in such event, the title to the property is to remain in said Charles Passow & Sons, also, until they receive the full amount in cash of the purchase."

It is conceded that Leautaud paid appellants the sum of six hundred and fifty dollars of the eleven hundred and eighty-seven dollars mentioned in the order on the day the order was given. The chattels mentioned in the order were subsequently shipped from Chicago to Salt Lake City, where, on the 28th day of December, 1907, appellants, as vendors, and

said Leautaud, as vendee. entered into the following contract, to-wit:

"This agreement, made and entered into between Louis A. Passow and Henry E. Passow, copartners as Chas. Passow & Sons, of the city of Chicago, in the State of Illinois, as the parties of the first part, and J. Leautaud, of Salt Lake City, county of Salt Lake, State of Utah, as party of the second part.

"Witnesseth, that the parties of the first part hereby lease and let unto the party of the second part the following described personal property, to-wit: [describing chattels] for the term of twelve months from and after the date hereof; and the party of the second part hereby promises and agrees to pay to the parties of the first part, as rental for such personal property during such term, the sum of \$1,187.00, to be paid as follows: The sum of \$650.00 at the time of the execution of this lease and the sum of \$45.00 on the 1st day of each and every month after the date of this lease, until the whole amount of such rental shall have been paid. Last payment to be \$42.00.

"The party of the second part further agrees to carefully use the property, hereinbefore described, at No. 29 Post Office Place, in the city of Salt Lake, State of Utah, and not elsewhere; to keep the same in good repair and condition; to pay interest on all rental at the rate of eight per cent. per annum until paid, and to keep said property insured in a solvent company, at the expense of the party of the second part, and in an amount equal to eighty per cent. (80) of the value of such property, with loss, if any, payable to the parties of the first part; and in case the party of the second part shall fail or neglect to secure such insurance, then the parties of the first part shall have the right to secure such insurance, and the amount of the premium paid therefor shall be, upon demand therefor, paid by the party of the second part to the parties of the first part.

"In case default shall be made by the party of the second part in the payment of the rental becoming due hereunder, or any part thereof, or in the performance of any of the terms or conditions of this lease, then and in that event the first parties shall, at any time after such default and while the same continues, be entitled to the possession of the property hereinbefore described, and shall have the right to enter any premises where the same may be and take possession thereof, with or without process of law."

To this contract was appended the following writing, termed an "option:"

"In consideration of the sum of one dollar, to us in hand paid, receipt of which is hereby acknowledged, and the payment of the rental as provided in the foregoing lease, we hereby grant and give unto the party of the second part to the foregoing lease, an option to purchase the property described in the said lease for the sum of one dollar, to be paid by the party of the second part on the 1st day of January, 1909. It is understood and agreed, however, that this option shall be void unless the payments of the rental shall be made as provided in the said lease and each and all of the conditions thereof performed by the party of the second part. Time is the essence of this contract. Chas. Passow & Sons, per W. H. Seber, Sales Agent."

The record further discloses that the vendee of said chattels, namely, Joseph Leautaud, on the 14th day of December, 1907, entered into a written agreement, whereby he leased a certain building from one R. B. Minor, Jr., for the term of one year, commencing on the 1st day of January, 1908, for an agreed rental of one hundred and twenty-five dollars per month, payable monthly in advance; that said Leautaud placed said chattels in said building, which he occupied and used for a pool and billiard room; that thereafter, on or about the 1st day of May, 1908, said Minor, Jr., conveyed said building, including said lease, to the Minor Building Company, a corporation; that said Leautaud defaulted in making payment of the rent due for the use of said building for the months of May, June, July, and August, 1908, aggregating the sum of five hundred six dollars and sixty-six cents; that on the 28th day of August, 1908, while said Leautaud was in possession of said building, and the chattels therein contained and now claimed by the appellants, said building company commenced an action against said Leautaud to recover the amount due for the rent as aforesaid, and, in said action, obtained a writ of attachment, by virtue of which respondent attached and took possession of the chattels claimed by appellants; that on said 28th day of August, said Leautaud duly entered his appearance in said action, and confessed judgment therein as prayed for in the complaint; that on the 1st day of September, 1908, a judgment was duly entered against said Leautaud in said action

"in favor of said building company for the sum of five hundred and six dollars and sixty-six cents and interest, and for fifty dollars attorney's fee; that thereafter an execution was duly issued on said judgment, and the same was duly levied on the chattels claimed by appellants, and the same were duly sold under said execution, and the proceeds thereof applied in part payment of said judgment. It is also made to appear that appellants demanded from respondent the chattels in question immediately after he had taken the same upon said writ of attachment, and again before he sold the same, and also protested the sale.

Upon the trial the court admitted certain evidence over appellants' objections, and excluded some which they offered. They complain of the court's rulings in this regard; but, in view of the result reached, these matters need no further consideration.

The court also admitted in evidence certain letters written by appellants. These letters were admitted in connection with the two instruments which we have set forth at large in this opinion, as having some bearing upon the construction that should be given them. We are of the opinion, however, that in this action appellants' and respondent's rights must be measured and determined from the conditions contained in the two instruments to which we have referred, and hence we shall not refer further to any of said letters. In view that the action is one for conversion each party must stand or fall upon his legal rights. The appellants contend that the transaction between them and said Leautaud, under the decisions of this court, constitute a conditional sale; that the title remained in appellants until the purchase price for said chattels was fully paid; that the same was not paid, but the vendee made default in the payment thereof, and therefore the title and the right to possession of said chattels, as against the respondent, always was and now is in appellants, and therefore the respondent never had or could have any right or title in or to the same, and hence by selling the same was guilty of conversion. The court, however, held that

the instrument executed by Leautaud and appellants on December 28, 1907, constituted a chattel mortgage; that said mortgage, while valid as between the parties thereto, was invalid as against the creditors of Leautaud, and hence as against the respondent, because appellants and said Leautaud had failed to comply with subdivisions 2 and 3 sec. 150, Comp. Laws 1907, relating to chattel mortgages. We cannot conceive upon what theory the trial court based its conclusion in view of the language used in the two instruments, all of which we have set forth at length, and which, in view of both the issues and the evidence, must control in this case. Whatever may be said with regard to the meaning or some of the provisions contained in said instruments, the intention of the parties that the title should not pass to the vendee Leautaud until he had complied with certain conditions is as certain as language can well make it. Whether the terms of the instruments which the court held constituted a chattel mortgage amounted to a lease or a conditional sale in so far as the rights of appellants and respondent are concerned is not of controlling importance. The respondent must fail if the legal title to the property in question was in appellants; for, in such event, it was their property, and not Leautaud's, when respondent levied upon the same. (*Kohler v. Hayes*, 41 Cal. 455.)

But it seems to us that under the decisions of this court there is no escape from the conclusion that the transaction between appellants and Leautaud, as the same is reflected in the written instruments to which we have referred, and which must control in this action, is, in legal effect, a conditional sale, by the terms of which the title to the property in question was to remain in appellants as vendors until the vendee had either executed and delivered a formal chattel mortgage by which the property was conveyed to appellants, or, in case no such mortgage was executed, then until the vendee had paid the full purchase price for said chattels. When and how did the vendee either make and deliver a chattel

mortgage or make payment of the purchase price? From the very terms of the agreement dated December 28, 1907, it is clear that, whatever else it may be called, it is not, and was not intended as, a chattel mortgage. Nor was it intended that thereby the title should pass from appellants to Leautaud. That in the absence of estoppels the intention of the parties, if such intention can be ascertained from their agreement, must control in this class as in all other cases, and that the whole agreement of the parties and the surrounding circumstances attending the transaction must be considered in arriving at such intention, is well stated by Mr. Justice Straup in the case of *Freed, etc., Co. v. Sorensen*, 28 Utah 419, 429, 79 Pac. 564, 567, 107 Am. St. Rep. 731. In discussing the question now under consideration it is said:

"It is well to observe that the determination whether a sale is absolute or conditional depends primarily upon the intention of the parties, to be gathered from all the terms of the contract, the circumstances attending the transaction, and the conduct of the parties. This is to be determined, not from any one or several stipulations in the contract disconnected from all others, and so construed as to render other portions of the contract nugatory, but it is to be determined by ascertaining the ruling intention of the parties, gathered from all the language they have used, and from a consideration of the whole contract, and, if possible, to give it such construction as will harmonize and give effect to all of its provisions."

If we apply the foregoing rule of construction to the language of the parties as contained in the written instrument introduced in evidence in this case, we can see no escape from the conclusion that, whatever else the ruling intention of the parties may have been, they did not intend that the title to the chattels in question should pass from appellants to said Leautaud unless and until the full purchase price thereof was paid. The passing of title therefore was made dependent on the payment of the purchase price. Whether the transaction be termed a lease or a conditional sale of the chattels cannot affect the result. (*Kohler v. Hayes, supra.*) Whatever such a transaction may be called it is neither an

absolute sale nor a mortgage. (1 Mechem on Sales, sec. 585.) Where, as in the transaction in question, the title is retained by the vendor, this court, as appears from the cases cited by Mr. Justice Straup, beginning with *Russell v. Harkness*, 4 Utah 197, 7 Pac. 865, to *Freed, etc., Co., v. Sorensen, supra*, has consistently and persistently held that a third person cannot acquire any interest in the property from the vendee by reason of his possession adverse to the vendor, without his consent, either express or implied. Whether such a rule, in all cases and under all circumstances, reflects the most equitable results is not a material question now. Those who transact business in this state have the right to rely upon the law as declared in the decisions of this court, and are entitled to the full legal effect of contracts respecting conditional sales. Nor are the legal effects of such contracts to be avoided by false or unnatural constructions. Such contracts, as pointed out by Mr. Justice Straup in the case quoted from, are to be considered and construed like other contracts, and if, by a fair and reasonable construction of any contract, it is apparent that the parties intended that the title should pass, or, if the ordinary and usual meaning of their language leads to such a result, then the transaction should be held to be a sale absolute, and treated like other sales. So long as it is clear that the parties did not intend title to pass, and the contract is legal, and in no way contravenes either public policy or a positive statute, the courts should enforce the contract made by the parties, and not make one for them.

Nor is the contention that appellants had not declared a forfeiture of the prior payment, either in the contract or afterwards, material. As between the parties to this action, and in view of the issues, it is not material what, if any, equities may exist as between the vendor and the vendee of the chattels, or any of his creditors. This is well illustrated in *Thirby v. Rainbow*, 93 Mich. 164, 53 N. W. 159. Whatever rights the vendee or any of his creditors might have in

a court of equity where, in view of proper pleadings, all the parties were in court, we need not decide. It may be that, where the vendee has paid nearly the whole purchase price, and thus has acquired a large equity in the chattels, either he or any creditor of his, in a proper proceeding in a court of equity, might require the vendor to receive the balance due on his contract, and that the court, after such payment, would then deal with the property as belonging to the vendee. The question, however, is not before us, and we express no opinion one way or the other upon it.

In view of what we have said, it follows that the court erred in holding that, under the contract in question, the title to the chattels passed from appellants to Leautaud, and that the transaction constituted a mortgage. 2
The judgment in favor of respondent, therefore, cannot be sustained.

The judgment is reversed, with directions to the trial court to grant a new trial, and to proceed with the case in accordance with the views herein expressed; appellants to recover costs.

STRAUP, C. J., and McCARTY, J., concur.

ON APPLICATION FOR REHEARING.

FRICK, J.

Respondent has filed a petition for rehearing, in which it is contended that this court erred in holding that it was the real intention of the parties to the agreement, set forth in the original opinion, that the title to the chattels herein mentioned should not pass "to said Leautaud unless and until the full purchase price thereof was paid." It is contended that the title was to be retained by appellants until payment was made only in case the transaction was a cash one; that the transaction passed on by us was not a cash transaction, and hence the condition that the title should not pass until full payment of the purchase price did not apply. In order

to prove this counsel for respondent argue in their application for rehearing that, if the mortgage referred to in the original order had been executed and delivered, no one could doubt that upon its execution and delivery the title would have passed from appellants to Leautaud. From this statement it is assumed that under the facts and circumstances of this case the title passed without the payments having been made. This contention is, however, based upon the theory that, if the appellants unconditionally delivered the chattels to Leautaud without insisting upon their payment in cash, or upon the execution and delivery of the mortgage in the original order mentioned, then the appellants have waived the condition precedent to the passing of title, and that the title to the chattels would have passed. As to whether appellants unconditionally made such a delivery it is contended is a question of fact which, as the opinion now stands, respondent is prevented from trying. When counsel for appellants, at the trial, attempted to show why the chattel mortgage was not executed and delivered, and further offered to explain why the agreement called a lease was executed in lieu of the mortgage, counsel for respondent objected, and the court sustained the objection. Both court and counsel then entertained the view, no doubt, that whether title to the chattels passed or not must be determined as a question of law from the terms of the written agreement entered into between appellants and Leautaud. In view of the issues we think the ruling was correct. In preparing the original opinion we thought, and still think, that, in view of all the facts and circumstances disclosed by the record, the question as to whether the parties intended that the title to the chattels should pass, and whether or not it did pass, is a question of law. In view of this conclusion no other result was possible than the one reached in the original opinion. The application for a rehearing, therefore, should be, and accordingly is, denied.

STRAUP, C. J., and McCARTY, J., concur.

STATE ex rel. BRANDL v. SILVER KING CONSOLIDATED MINING COMPANY OF UTAH et al.

No. 2051. Decided January 6, 1910 (106 Pac. 520).

1. CORPORATIONS—STOCKHOLDERS—INSPECTION OF CORPORATE BOOKS—ENFORCEMENT OF RIGHT. In a proceeding to compel a corporation to allow an examination of its books, the testimony of plaintiff that he had not demanded a list of the stockholders and that he had not expressed a desire for such list, where immediately after such statement he corrected his testimony, and testified that he did desire the names of the stockholders, and gave his reasons for wishing such knowledge, does not warrant the finding that plaintiff "has disclaimed any desire to inspect the stock books of said defendant corporation, or to obtain any information as to who said stockholders were." (Page 65.)
2. CORPORATIONS—INSPECTION OF CORPORATE BOOKS BY STOCKHOLDERS—ENFORCEMENT OF RIGHT—EVIDENCE. In a proceeding to compel a corporation to allow a stockholder to inspect the corporate books, where defendant's answer admitted that plaintiff wanted to ascertain the names of the stockholders, testimony of plaintiff as to whether he wished to learn the names of the stockholders was irrelevant, there being no issue as to whether plaintiff wanted the names of stockholders. (Page 67.)
3. EVIDENCE—EVIDENCE ADMISSIBLE BY ADMISSION OF SIMILAR EVIDENCE. The mere fact that the court permitted irrelevant evidence could not create an issue where none was presented by the pleadings. (Page 67.)
4. CORPORATIONS—INSPECTION OF CORPORATE BOOKS—RIGHT OF STOCKHOLDERS. Under Comp. Laws 1907, sec. 329, providing that "the books of every corporation . . . must be kept as to show the original stockholders . . . and the transfers thereof," a corporate stockholder has the right to inspect the corporate books to ascertain the names of other stockholders in the absence of any reason for denying such right.¹ (Page 68.)

APPEAL from District Court, Third District; *Hon. M. L. Ritchie*, Judge.

¹ Clawson v. Clayton, 33 Utah, 266, 93 Pac. 729, distinguished.

Application by the State, on the relation of Joseph Brandl, for a writ of mandate to the Silver King Consolidated Mining Company of Utah, a corporation, and G. W. Browning, secretary.

From a judgment for insufficient relief, relator appeals.

REVERSED.

Snyder & Snyder for appellant.

Henderson, Pierce, Critchlow & Barrette and *Howat & Macmillan* for respondents.

APPELLANT'S POINTS.

It is no longer the subject of doubt in this state that the corporate books and papers of any incorporation may be examined by a stockholder either in person or through an agent for all lawful and proper purposes, and certainly for the purposes shown in this application. (Compiled Laws of Utah, 1907, section 329; *Harkness v. Guthrie*, 27 Utah, 248, 199 U. S. 148; *Clawson v. Clayton*, 33 Utah 266; *Cobb v. Lagarde*, 129 Ala. 488, 30th So. 326; *Mitchell v. Rubber Reclamation Co.*, 24 Atl. 407; *Weihenmayer v. Bitner*, 42 Atl. 245, 88 Md. 325; *Stone v. Kellogg*, 46 M. E. 222, 165 Ill. 192; *Foster v. White*, 86 Ala. 457, 6 So. 89, *Cincinnati Volksblatt Brewing Co. v. Hoffmeister*, 56 N. E. 1033; *State ex rel. Weinberg v. Pacific Brewing & Malting Co.*, 21 Washington 451; *People v. Goldstein*, 56 N. Y. S. 306; 2 Clark & Marshall, p. 1649, 50, note; *Stone v. Kellogg*, 165 Ill. 204, 46 N. E. 222; *In re Steinway*, 45 L. R. A., p. 462, *et seq.*; Notes bottom page 462, 463, 464; *Swift v. State ex rel. Richardson*, 6 Atl. 856.)

FRICK, J.

Appellant, as a stockholder of the respondent Silver King Consolidated Mining Company of Utah, made application to

the district court of Salt Lake County for a writ of mandate requiring said company and one G. W. Browning, its secretary, to permit appellant, through an expert accountant, to examine the books of said company for the purpose of ascertaining therefrom "the amount of issued stock of said corporation, the names of the stockholders, and the financial condition of said corporation." The court issued an alternative writ, to which the company aforesaid and Mr. Browning, hereinafter designated respondents, filed their answer, in which they contested the right of appellant to inspect the books of said corporation. Respondents, however, in their answer, admitted that appellant demanded an inspection of the books at the time and for the purposes alleged, but they averred that the reasons stated by him were not the only reasons for which he desired to inspect the corporate books. In view that the court found that the averments in the answer were not sustained by the evidence, we shall not refer to the answer further.

Upon the hearing the court found the facts, in substance, as follows: That said Silver King Consolidated Mining Company of Utah is a corporation incorporated under the laws of Utah; that appellant is a bona fide stockholder of record of said corporation; that appellant had duly applied for and had requested said respondents during business hours to permit him, through an accountant, to examine the books and records of said corporation; and that said respondents refused such request, and refused appellant the right to examine said books and records. The fifth finding of fact, and the only one which is questioned by appellant, is as follows: "That the relator has disclaimed any desire to inspect the stock books of said defendant corporation or to obtain any information as to who said stockholders were." Then follows the finding that "the allegations of defendants' answer are not sustained by the evidence." Upon these findings, the court made conclusions of law by which he found that appellant was entitled to a peremptory writ of mandate "directing and compelling the defendants to permit relator, by a compe-

tent and proper agent duly appointed, to inspect all the books of account, vouchers, and records of said defendant corporation *except so far as the same may disclose the names of the stockholders of said defendant corporation.*" (*Italics ours.*) Judgment was entered in accordance with the foregoing findings and conclusions. The record also discloses that after said judgment was rendered appellant, through his accountant, attempted to inspect the "books of account, vouchers and records," and in doing so a certain voucher for fourteen thousand seven hundred dollars and fifteen cents was withheld from the accountant for the reason that the voucher "would disclose the names of stockholders." Appellant then, by motion, applied to the court for a modification of the writ so as to permit him to "examine the sources of receipts and all disbursements, . . . even though the same may disclose the name of a stockholder." The court refused to make the modification, and denied the motion. The appeal is from the original judgment.

Counsel for appellant have assigned a large number of errors, but, as we view the matter, the whole case turns on whether the fifth finding of fact and the conclusion of law, both of which we have given in full, and both of which are attacked by appellant, can be sustained. Counsel for appellant earnestly insist that the fifth finding of fact is contrary to, and is not supported by the evidence. This so-called finding of fact, as we read the record, is not responsive to any issue in the case. Appellant in his application for the writ asked the right to make an examination of the corporate books to ascertain, among other things, "the names of the stockholders." It is true that on cross-examination he, in substance, testified that he was not asking for 1 a list of the stockholders, and that he had not asked the secretary of the corporation for such a list. When, however, his attention was directed to what he had asked for in his application, he at once said, "I remember now," and at once corrected his former testimony by stating that he

did ask for a list of its stockholders, and that he did "want to find out who were the stockholders." He followed these statements by giving his reasons for wanting to know who the stockholders were. All these statements were made on cross-examination, and were made within a few minutes of time. It is very clear that the witness when first asked about the list of stockholders had forgotten about the matter, and that, when his attention was directed to his application, he then recalled the fact, and then stated that he desired a list of the stockholders, and gave his reasons therefor. In view of the state of the record, it is not easy to understand how the court arrived at the conclusion that the appellant "has disclaimed any desire to inspect the stock books," and thus did not want to know who the stockholders were. The most that can be deduced from appellant's testimony, when all he said is considered, is that he denied having at any time demanded a list of the stockholders, and further denied having at some time prior to the giving of his testimony expressed a desire for a list of the stockholders, or that he desired to know who his fellow stockholders were. But, immediately after having made the foregoing statements, he testified that he did desire to know who his fellow stockholders were, and gave his reasons for desiring to know. The foregoing in our judgment is a fair statement of what appellant's testimony amounts to. After giving it all the force and effect that it is entitled to, it falls far short of supporting the conclusion that appellant "has disclaimed any desire to inspect the stock books of said defendant corporation or to obtain any information as to who said stockholders were." After the appellant had made the denials we have alluded to, and after he refreshed his recollection, he positively stated that he did desire to know who the stockholders were, and further stated his reasons for so desiring. Keeping in mind the circumstances under which both denials and the positive statements above referred to were made and their character, the denials were clearly modified, and thus lost their probative force and effect. But, apart from this, as we have point-

ed out, respondents admitted in their answer that appellant wanted to inspect the books for the purposes stated by him, one of which was to learn who the stockholders were. They averred, however, that those were not the only purposes he had in view. The court, however, found that this averment was not true. That appellant wanted to learn who the stockholders were was therefore admitted by the answer, and hence no issue in this respect was presented. 2 When appellant's counsel therefore objected to the cross-examination of appellant as irrelevant, the court should have sustained the objection. But the mere fact that the court permitted the evidence could not create an 3 issue where none was presented by the pleadings.

But, assuming that the court was justified in concluding for appellant's statement that in making the demand to inspect the corporate books his principal purpose was not to learn who the stockholders were, or that he then had no desire to learn that fact, how does this affect appellant's rights in view of the court's findings? It appears from the findings that the court found every fact which entitled appellant to an inspection of the corporate books for any purpose in his favor. Moreover, the court found that all the matters that were set forth in respondent's answer, whether they amounted to a defense or not, were not sustained by the evidence. This being so, upon what theory did the court limit appellant's right to inspect the corporate books? It would seem self-evident that the right of a stockholder to know who his fellow associates were, in view of the facts found by the court, could not be questioned by the corporation or any one else, and cannot be interfered with by a judgment of a court. Suppose a stockholder says: "As I view it now I do not care to know who the stockholders are." Is that a good reason for the court's denying him the right to learn that fact from the corporate books if he should change his mind about the matter? In many of the states corporations must keep a correct list of the stockholders, and such list must constantly be accessible to the stockholders. Section 329, Comp. Laws 1907, among

other things, provides: "The books of every corporation . . . must be kept as to show the original stockholders . . . and the transfers thereof." In our judgment it requires no argument to show that this provision is intended for the benefit of the stockholders rather than for the benefit of the corporation. This is but reasonable. Why should any one be denied the right of knowing who his associates are? Upon what ground can a denial of such a right be based? If it be possible to make any defense in support of such a denial (a matter we do not pass on), there certainly is nothing in the record before us that can be said to support any such defense. Under the facts as found by the court, the appellant is clearly entitled to an inspection of the corporate books, and to ascertain therefrom, if he so desires, who his fellow associates are.

Counsel for both parties have argued with much force and ability the question as to whether the right of a stockholder to inspect the corporate books under our statute is absolute, and whether such right may be enforced regardless of any motive or purpose he may have in view. While 4 these questions are interesting, and have to a limited extent been passed on by this court in *Clawson v. Clayton*, 33 Utah, 266, 93 Pac. 729, we cannot see how they are involved in this case. As appears from the case of *Clawson v. Clayton*, whatever defense a corporation may have it must be set up in the answer. In this case an alleged defense was set up, but the court found that whatever was set up in the answer was not sustained by the evidence. This finding is not assailed. For the purposes of this decision there was therefore no defense, hence what might or might not be a defense is not material.

For the reasons aforesaid, we are of the opinion that the court erred in limiting appellant's right to inspect the corporate books. The judgment is therefore reversed and the cause is remanded to the district court, with directions to set aside the fifth finding of fact or conclusion, whichever it may be called, to modify its conclusions of law to conform

to the views expressed in this opinion, and to modify the judgment so as to make the writ issued thereunder unconditional, and, when so modified, to order a writ of mandate to issue whereby respondents are required to permit appellant to inspect the corporate books of the respondent company as prayed for by him in his application, appellant to recover costs.

STRAUP, C. J., and McCARTHY, J., concur.

CAINE v. HAGENBARTH.

No. 2094. Decided January 6, 1910. On Application for Rehearing, February 11, 1910 (106 Pac. 945).

1. **CONTRACTS—CONSTRUCTION—INTENT.** The primary object in the construction of a contract is to discover the intent of the parties from a consideration of the whole contract. (Page 78.)
2. **CONTRACTS—CONSTRUCTION—EQUITABLE AND UNCONSCIONABLE RESULT.** Where the exact meaning of a written contract is in doubt, as where the language used is contradictory and obscure, and there are two interpretations possible, one of which establishes a comparatively equitable contract and the other an unconscionable one, the former should prevail. (Page 82.)
3. **MINES AND MINERALS—MINING OPTION—TRANSFER—CONSIDERATION—CONDITIONS.** Plaintiffs had secured from a mining company an option on a copper mine for sixty days from January 17, 1907, for one million dollars, provided they paid five thousand dollars of the purchase price within thirty days, and thereafter in the event of a sale two hundred and forty-five thousand dollars in two months from the date of the option, and the balance in equal installments in four, six, and eight months from that date. The option was valueless to plaintiffs unless they could sell it within the time specified to a person able to perform, and after one attempted sale had failed, when the option had only thirty-nine days to run, plaintiffs effected an assignment thereof to defendant in consideration of two hundred thousand dollars, the writing reciting that plaintiffs sold all their right, title, and interest in the option described, and did "by this conveyance for the consideration therein

named convey the following described mining property and claims" to defendant, conditioned on the following payments: Ten thousand dollars, part of the two hundred thousand dollars, paid at once; forty thousand dollars to be paid "at the time when" defendant shall be required to pay to the mining company the first payment under the option; the remaining portion—one hundred and fifty thousand dollars—to be paid "in proportionate amounts on the dates when the payments are made" by defendant under the terms of the option to the mining company. *Held*, that such assignment did not bind defendant absolutely and in all events to pay the balance of the two hundred thousand dollars consideration, but that his liability for such amount was conditional on his completing the option, and thereby becoming obligated to pay the mining company the installments of the purchase price for the mine, and defendant having elected not to take up the option was not liable to plaintiffs for the balance of the consideration. (Page 94.)

ON APPLICATION FOR REHEARING.

4. EVIDENCE — PAROL EVIDENCE — WRITTEN CONTRACT — AMBIGUOUS TERMS—EXPLANATION. Such assignment contract was not so plain and unambiguous as to preclude the admission of extrinsic evidence of the surrounding facts and circumstances, the nature of the subject-matter, the relation of the parties, and the purposes sought to be obtained thereby to aid in its construction. (Page 97.)

APPEAL from District Court, Third District; *Hon. T. D. Lewis*, Judge.

Action by Joseph E. Caine and another against F. J. Hagenbarth.

Judgment for plaintiffs. Defendant appeals.

REVERSED AND REMANDED, WITH DIRECTIONS.

Dickson, Ellis, Ellis & Schulder for appellant.

O. S. Price and Van Cott, Allison & Riter for respondents.

APPELLANT'S POINTS.

The question as to what is the true construction of a written instrument is one of law, to be answered by the court.

If the writing is upon its face ambiguous, or uncertain, the court may receive evidence as to the situation of the parties and the facts and circumstances surrounding them at the time they entered into the agreement. (*Manti City Sav. Bank v. Peterson*, 33 Utah 209, 216-17; *Dwight v. Germania Life Ins. Co.*, 103 N. Y. 341, 57 Am. St. Rep. 729, 722-4; *R. L. Polk Printing Co. v. Smedley*, 155 Mich. 249; 2d Parsons on Contracts (4th Ed.), p. 4; *Smith, Admr., v. Faulkner et al.*, 12 Gray [Mass.] 251, 254-6.) The burden is on the plaintiffs. (*Breckenridge v. Crocker*, 78 Cal. 529.) The object of all established rules for the interpretation of contracts is to ascertain the intention of the parties thereto. (2d Parsons, pp. 7-12; *Gibson v. Miney*, 1 H. B. L. 569; *Rankin v. New England, etc., Mining Co.*, 4 Nev. 78; *V. & T. R. R. Co. v. Lyon Co.*, 6 Nev. 68; *Mutual Life Ins. Co. v. Kelly*, 114 Fed. 268; *Walsh v. Hill*, 38 Cal. 481; *Haverley v. Brumagin*, 33 Cal. 394; *Darby v. Arrowhead H. S. H. Co.*, 97 Cal. 384; *Piano Mfg. Co. v. Ellis*, 68 Mich. 101; *Muldoon v. DeLine*, 135 N. Y. 150; *Gavinzel v. Crump*, 22 Wall. 308; 17 Am. & Eng. Ency. of Law, pp. 23-21; *Schuykill Navigation Co. v. Moore*, 2 Wharton 491; *Harrison v. Fortlage*, 161 U. S. 57; *Cravens v. Mills Co.*, 16 Am. St. Rep. 298; *Francis Bros., etc., v. Heine Safety Boiler Co.*, 112 Fed. 899; *Fitzgerald v. First N. Bank*, 114 Fed. 474; *Chicago, etc., Ry. v. Reilly*, 145 Fed. 137; Potter's Dwarries on Statutes, p. 143; *Ogden v. Glidden*, 9 Wis. 40; *Hudson Canal Co. v. Penna. Coal Co.*, 8 Wall. 276.) Where the language of an agreement is contradictory or ambiguous, so that it is fairly susceptible of two constructions, one of which makes it a fair contract, while the other makes it inequitable, the interpretation which makes it rational and probable must be preferred to that which makes of it an unusual, unfair or improbable contract. (*Coghlan v. Stetson*, 19 Fed. 737; *Washington, etc., Ry. Co. v. Coeur d'Alene Ry. Co.*, 160 U. S. 77; *Salt Lake v. Smith*, 104 Fed. 457; *Pressed Steel Car Co. v. Railroad*, 121 Fed. 609; *American Bonding Co. v. Pueblo Invest. Co.*, 150 Fed. 17. See also *Scott*

v. The United States, 12 Wall, 443; *Jacobs v. Spaulding et al.*, 71 Wis. 177, 186; *Turner v. Kearney*, 106 Cal. 62, 47; *Johnston v. Schenck*, 15 Utah 490.) What one party to a contract understands or believes is not to govern its construction, unless such understanding or belief was induced by the conduct or declarations of the other party. (*Bank v. Kennedy*, 17 Wall, p. 19.) There is no contract, unless the parties thereto assent; and they must assent to the same thing, in the same sense. (1 Parsons on Contracts [5th Ed.], p. 475; 1 Chitty on Contracts, 11th Am. Ed., p. 11; *Breckenridge v. Crocker*, 78 Cal. 529, 535-537; *Hartford & New Haven v. Jackson* [24 Conn.], 63 Am. Dec., p. 177; *Uiley v. Donelson*, 94 U. S. 29, 47-48; *Harvey v. Duffy*, 99 Cal. 401; *Menz v. Hogue*, 91 Cal. 442, 448; *Rovengo v. Defferari*, 40 Cal. 459, 462-3; *National Bank v. Hall*, 101 U. S. 43, 49-50; *Rockefeller v. Merriitt*, 76 Fed. 909, 915.) There can be no more satisfactory evidence of the actual value of property than that furnished by an actual sale of it by the owner, unless there be evidence that the circumstances under which this sale was made were such as would preclude, or be likely to preclude, the owner realizing a fair price for his property. (*The Albert Dumois*, 177 U. S. 240, 255; *Lynch v. United States*, 138 Fed. 535, 539; *Kaufman v. Pittsburg C. & W. R. Co.* [Pa. St.], 60 Atl. 2; *Grand Rapids v. Loose*, 92 Mich. 92; *Hangen v. Hachemeister* [114 N. Y.], 11 Am. St. Rep. 691, 695-6; *Mayor, etc., of Baltimore v. Smith & S. B. Co.*, 31 Atl. Rep. 423.) It is contended by plaintiffs that where a contract is ambiguous, the construction must be against the party who is responsible for the ambiguity, and also against the promisor. This is a rule of construction which is never invoked except as a last resort. (See Wharton's Legal Maxims, closing paragraph on page 206; Broom's Legal Maxims, p. 593; 2 Parsons on Contracts [4th Ed.], p. 19-21; 1 Chitty on Contracts, pp. 137-8; 17 Am. and Eng. Law, p. 16.)

RESPONDENT'S POINTS.

It is very elementary that the contract of sale is not an option. See 21 Ency. Law (2 Ed.), 924-5. When a person receives title to property and retains it as the defendant did and is to pay for the same in the language stated, he is obligated to pay in any event. (*Nunez v. Dantel*, 19 Wall. [U. S.] 560; *Johnston v. Schenck*, 15 Utah, 490; *Alvord v. Cook*, 174 Mass. 120; *Page v. Cook*, 164 Mass. 116; *Eaton v. Yarborough*, 19 Ga. 82; *Crooker v. Holmes*, 65 Me. 195; *Haines v. Weirick*, 155 Ind. 548; *Noland v. Bull*, 33 Pac. [Ore.] 983; *Hicks v. Shouse*, 17 B. Mon. 483. See also to the same effect: *De Wolfe v. French*, 51 Me. 420; *Sears v. Wright*, 24 Me. 278; *Randall v. Johnson*, 59 Miss. 317; *McCarty v. Howell*, 24 Ill. 342; *Button v. Higgins*, 38 Pac. 390; *Crass v. Scruggs*, 115 Ala. 258; *Walters v. McBee*, 1 Lea [Tenn.] 364; Paige on Contracts, Sec. 1156; *Lewis v. Tifton*, 75 Am. Dec. 498; *Ubsdel v. Cunningham*, 22 Mo. 124; *Hood v. Hampton Plains, etc.*, 106 Fed. 408.) When an appellate court is asked to set aside the verdict of a jury in a common-law action upon the facts, all conflict in the evidence must be resolved in favor of the party in whose favor the verdict was rendered. (*Chicago, etc., Ry. v. Sharp*, 63 Fed. 533; *Railroad Co. v. Conger*, 5 C. C. A. 411, 56 Fed. 20; *Railroad Co. v. Teeter*, 63 Fed. 527; *Railway Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. 281; *Connor v. Raddon*, 16 Utah 418; *Smith v. Ireland*, 4 Utah 187.) If the contract between the parties is to be interpreted from the standpoint of its being uncertain or ambiguous, an interpretation should be taken which favors the one who parted with his property. (*Noonan v. Bradley*, 9 Wall. 407; *Barney v. Newcomb*, 9 Cush. 56; *Hawkins v. Graham*, 149 Mass. 287; *Evans v. Sanders*, 33 Am. Dec. 298.) A contract is to be interpreted against the one who is responsible for the ambiguous language. (*Christian v. First National Bank*, 155 Fed. 709; *Noonan v. Bradley*, 9 Wall. [U. S.] 394, 407, 19 L. Ed. 757; *Texas & Pacific Ry. Co. v. Reiss*, 183 U. S. 621, 626, 22

Sup. Ct. 253, 46 L. Ed. 358; *Osborne v. Stringham*, 4 S. D. 593, 57 N. W. 776; *Imperial Fire Ins. Co. v. Coos*, 151 U. S. 462-3.) The construction in case of ambiguity or uncertainty is in favor of the one who has parted with his property, or with his premium. (*Blankenship v. Decker*, 85 Pac. 1037; *Bickford v. Kerwin*, 30 Mont. 1, 75 Pac. 518; *Gillet v. Bank of America*, 160 N. Y. 549, 55 N. E. 292; *Wilson v. Cooper* [C. C.], 95 Fed. 625; *Allen-West Com-Co. v. People's Bank* [Ark.], 84 S. W. 1041; *Hill v. John P. King Mfg. Co.* [Ga.], 3 S. E. 445; *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231; *Noonan v. Bradley*, 9 Wall. [U. S.] 394, 19 L. Ed. 757; *Webster v. Dwelling House Ins. Co.*, 53 Ohio St. 558, 42 N. E. 546, 30 L. R. A. 719, 53 Am. St. Rep. 658, 9 Cyc. 509.) As authorities to the effect that an isolated sale is not competent evidence of value, we cite: *Pate v. Mitchell*, 79 Am. Dec. [Ark.] 114, 115; *People, etc., v. McCarthy*, 8 N. E. [N. Y.] 85, 87; *Spring Valley, etc., v. Drinkhouse*, 92 Cal. 528, 532; *Omaha S. R. Co. v. Todd*, 58 N. W. [Neb.] 289, 291. Evidence of sales of similar property is not competent for the purpose of proving value. (*Railroad Co. v. Benson*, 36 N. J. Law, 557; *Railroad Co. v. Hiester*, 40 Pa. St. 53; *Railroad Co. v. Bunnell*, 81 Pa. St. 414; *Railroad Co. v. Ziemer*, 17 Atl. 187; *Railroad Co. v. Pearson*, 35 Cal. 247, 262; *Railroad Co. v. Keith*, 53 Ga. 178.) Error without prejudice is not ground for reversal. (*Snell v. Crowe*, 3 Utah 26; *Rogers v. Railroad* [Utah], 90 Pac. 1075; *Chambers v. Emery*, 13 Utah 405; *Western, etc., Soc. v. Desky*, 24 Utah 347; *Jenkins v. Mammoth M. Co.* 24 Utah 513.) If it be assumed that error was committed and yet the result would not have been changed by admitting the testimony, still the judgment must be affirmed. (*Chambers v. Emery*, 13 Utah 405; *Wolcott v. Smith*, 15 Gray 537; *Coal Co. v. Kelly*, 156 Ill. 9.) An appellate court will not reverse the judgment for an error of law which did not affect the merits. (*Chambers v. Emery*, 13

Utah 405; *Maynard v. Locomotive, etc., Assn.*, 16 Utah 150; Compiled Laws of Utah 1907, secs. 3285, 3008).

FRICK, J.

On the 17th day of January, 1907, respondents entered into an agreement in writing with the Ludwig Copper Mining Company, a corporation, whereby they were given an option to purchase certain copper mines of said company located in the State of Nevada. The option was good for sixty days at the stipulated price of \$1,000,000 for the mine, provided the respondents paid \$5,000 of the purchase price within thirty days from the 17th day of January aforesaid; and thereafter, if the option eventuated in a sale, the purchase price was to be paid, \$245,000 in two months from the date of the option, \$250,000 in four months, \$250,000 in six months, and the remaining \$250,000 in eight months from said date. This option agreement, by consent of the parties, was deposited with the Anglo-California Bank of San Francisco, Cal., and with it was deposited a check of one of the respondents for said sum of \$5,000, which was, however, not to be presented for payment unless so ordered by him. On the 7th day of February, 1907, the respondent Caine, for himself and as attorney in fact for his co-respondent, entered into a written agreement with the appellant, the material parts of which are as follows:

"This agreement, made and entered into this 7th day of February, 1907, by and between Jos. E. Caine, of Salt Lake City, Utah, and Max Junghandel, by his attorney in fact, Jos. E. Caine, parties of the first part, and F. J. Hagenbarth, of Salt Lake City, Utah, party of the second part, witnesseth: That the said first parties do this day sell, transfer and assign for and in consideration of two hundred thousand dollars, all their right, title and interest in and to a certain written option agreement in writing dated January 17, 1907, which they have made with the Ludwig Copper Mining Co., a corporation of the State of Nevada, and the said first parties do by this conveyance for the consideration therein named, convey the following described mining property and claims to the said second party, to wit: [Here follows a lengthy description of the property included within the option.] . . . under the terms of said written agreement herein referred to, and

conditioned upon the following payments, to-wit: ten thousand dollars, being a part of the two hundred thousand dollars herein named, be paid in cash upon the execution of this agreement, receipt of which is hereby acknowledged; forty thousand dollars to be paid to the said first parties at the time when the said second party shall be required to pay to the Ludwig Copper Mining Co. the first payment under the terms of said written agreement or any modification thereof as to the time of said payment; the remaining portion of said consideration, being one hundred and fifty thousand dollars, shall be paid by the said second party to the said first parties in proportionate amounts on the dates when the payments are made by the said second party under the terms of said written agreement or any modification thereof, to the Ludwig Copper Mining Company."

The appellant paid respondents \$10,000 of the \$200,000 mentioned in said agreement, and also advanced the \$5,000 necessary to continue the option in force beyond the thirty days, making a total payment made by him of \$15,000, \$10,000 of which was to apply on the \$200,000 and \$5,000 on the \$1,000,000, purchase price of said copper mine. The \$15,000 payment was made some days after the foregoing agreement was entered into, and was withheld by appellant until the original option agreement entered into between said copper company and respondents could be deposited by respondents in McCornick's bank, at Salt Lake City, Utah, which was done February 15, 1907. Appellant, after causing the underground workings of the mine in question to be examined by experts, refused to take up said option. That is, he refused to purchase the mining property in question and made no other payment, except as above stated. When the time arrived at which the \$245,000 payment on the purchase price of the mine would have been due had the option not been forfeited, the respondents demanded payment from the appellant of the \$40,000 mentioned in the agreement we have set forth; and when the second payment under the option would have been due the respondent demanded from the appellant the further sum of \$50,000. Appellant refused to pay either of the sums demanded, and respondents commenced this action, and in their complaint, in substance, at least, the foregoing facts are made to appear.

In the first complaint filed respondents pleaded and relied upon the written agreement in the form in which we have copied it. Appellant demurred to this complaint, and the court sustained the demurrer upon the ground that the agreement was ambiguous and uncertain, whereupon respondents amended their complaint. In the amended complaint they more fully set forth the transaction, and also pleaded the legal effect of the agreement as they construed it to be. Appellant answered this complaint, and, in his answer, after admitting making the agreement and some other matters, denied all the facts relating to his liability; and further denied respondents' statement respecting the legal effect of said agreement, and also pleaded the legal effect as appellant construed the writing in question. At the trial there was a large mass of evidence introduced by both parties, and the court made findings of fact based upon such evidence. Appellant attacks some of these findings as not sustained by the evidence and as contrary thereto. In view that such parts of the evidence as we deem material are not disputed, and for the further reason that both parties insist that we may arrive at the true meaning of the written agreement without resorting to extrinsic evidence, we will not discuss the findings nor allude to them further.

The following facts and deductions from other facts will, we think, not be disputed, namely, that respondents had a mere option to purchase the mine in question, and had no other rights in or to the same; that neither at the time the option agreement was obtained, nor at any other time thereafter, were the respondents able to purchase the property in question; that they had theretofore offered the option to some one else, but the party to whom the offer had been made refused to enter into an agreement to purchase the mining property; that respondents had to rely upon finding some other purchaser able and willing to take up the option, and that unless they found some such purchaser within the life of the option, unless the same was extended, the option became worthless, and if they continued it in force for more

than thirty days they might lose \$5,000 by the venture; that the real value of the mine was speculative and in a large measure uncertain, although both respondents and appellant believed it to be worth more than the purchase price named in the option agreement, but this belief was not based upon actual or known facts; that when the option was transferred from respondents to appellant it had but thirty-nine days to run, and when the papers were finally turned over to appellant, there were but thirty-one days left; that the value of the option, to some extent at least, necessarily depended upon the time respondents had within which to find a purchaser for the mine in question; that appellant apparently thought the purchase a good one and was desirous of making it, and respondents were correspondingly desirous to sell and transfer the option to some one able to complete the purchase upon the terms and conditions named in the option agreement. There are some other features to which we shall refer hereafter.

The court construed the agreement above set forth as though it were one for the sale of property at a fixed consideration which was agreed to be paid at the happening of some future event, the time of such event, in this case, having been stipulated by the parties, and the time when appellant was obligated to pay under the agreement was at the happening of the event referred to. The court found for the respondents, and entered judgment in their favor for the sum of \$90,000 and accrued interest.

Counsel for appellant contend that the court erred in its construction of the written agreement. As we have already intimated, both parties now insist that the agreement is not ambiguous nor uncertain, and hence extrinsic evidence is not necessary as an aid in ascertaining the true meaning of the language or the intention of the parties. We think, however, that the trial court was right in concluding that the meaning of the language used by the parties is not entirely clear nor free from ambiguity, and hence it is proper to consider extrinsic evidence, to the extent at 1

least that we have outlined above, for the purpose of arriving at the real intention of the parties according to the sense in which they intended to apply the language used by them and to aid us in arriving at such intent. While counsel for appellant contend that the language is free from all ambiguity, they, nevertheless, insist that whether the language contained in the writing is construed by itself or in the light of the extrinsic matters stated, in either event but one conclusion is legally permissible, and that is, that the trial court erred in the construction it placed upon the writing. Counsel further contend that the events mentioned in the writing were not primarily intended as fixing a time when payments should be made, but that the happening of the events was the condition upon which depended the right of respondents to demand and the duty of appellant to pay said sum of \$190,000 in addition to the \$10,000 theretofore paid by him. Stating it in another form, counsel insist that the happening of the events mentioned in the agreement was not intended as fixing the time when appellant should be required to pay the additional \$190,000, but that it was intended that when he actually made the payments to the copper company for the mining property, then, and then only, should appellant become obligated to pay the respondents the additional amount aforesaid, and that the amounts for which appellant thus became obligated would become due and payable at the same time that the obligation to pay the copper company arose. That is, if appellant took up the option and thus became legally obligated to pay the copper company the purchase price of the mine, by the same act he also became obligated to pay respondents said \$190,000 which was to be paid at the time and in the manner stated in the agreement. While counsel for both sides seem quite certain that they are right in their contentions, we confess that we have found the matter not entirely free from difficulty. The amount involved, and the possible effect the result might have upon their clients, necessarily engender strong feelings in counsel on both sides, and they thus are

led to use strong language in support of their respective claims. While the effect that the enforcement of a contract may have upon a particular party cannot influence the judgment of the court, still the effect or result that may follow a particular construction always is proper to be considered by the court, and will be considered, if for no other purpose than to induce the court to make a more searching examination of, and to more thoroughly reflect upon the questions involved in the controversy. In this connection it is but just to say that if the question is decided one way it might result in transferring from appellant all that he is possessed of, while, upon the other hand, if the appellant has assumed the obligation and has unconditionally agreed to pay, as contended for by respondents, then we have no right to withhold from them that which legally is theirs any more than we have a right to require appellant to yield up his property unless he has legally bound himself to pay.

The questions, therefore, are: What is the obligation appellant has assumed in entering into the written agreement, and what are respondents' rights in view of its provisions? The answers to these question depend upon the true meaning of the language contained in the writing and the intention of the parties as such intention existed at the time they entered into the agreement. To determine this meaning and intention is our duty, and in discharging it we must, of course, have recourse to the language of the parties, which must be considered and applied to the subject-matter in accordance with the rules of construction which the courts have adopted as guides or aids in determining the intention of those whose words are subject of construction. We will briefly refer to some of those rules known as rules of construction. In 2 Paige on Contracts, section 1104, the author says: "The primary object of construction in contract law is to discover the intention of the parties. This intention in express contracts is, in the first instance, embodied in the words which the parties have used and is to be deduced therefrom." Again, in section 1106, it is said: "The context and

subject-matter may affect the meaning to be given to the words of a contract, especially if in connection with the subject-matter the ordinary meaning of the term(s) would give an absurd result." So the general paramount intent controls the special intent, and in this way it sometimes becomes necessary either to enlarge or to restrict the ordinary meaning of words in order to preserve the paramount intent of the parties to the agreement. (2 Paige on Contracts, sec. 1113.) One of the cardinal rules requires that "as between two constructions, each probable, one of which makes the contract fair and reasonable and the other of which makes it unfair and unreasonable, the former should always be preferred." (2 Paige on Contracts, sec. 1121.) Another author, whose work on contracts has, for many years, been recognized as a standard authority, namely, Parsons on Contracts, in volume 2 (9th Ed.), star page 494, says: "The first point is usually to ascertain what the parties themselves meant and understood." And, on page 501 of the same volume, it is said: "The court will endeavor to give to the contract a rational and just construction."

Referring, now, to some cases wherein the courts have given expression to some of the rules that should be applied in construing contracts, we find that in an early case decided by the Supreme Court of Pennsylvania, Mr. Chief Justice Gibson, who is recognized as one of the beacon lights of American jurisprudence, uses the following language:

"The best construction is that which is made by viewing the subject of the contract, as the mass of mankind would view it; for it may be safely assumed that such was the aspect in which the parties themselves viewed it. A result thus obtained is exactly what is obtained from the cardinal rule of intention." *Schuykill, etc., Co., v. Moore*, 2 Whart. (Pa.), 490.

So, in *U. S., etc., Co. v. Board of Com'rs*, 145 Fed., Mr. Justice Sanborn, in speaking of the rules to be observed in construing contracts, at page 148, 76 C. C. A., at page 118, says:

"The purpose of every written contract is to express the intention of the parties. The object of all construction of agreements is to ascertain that intention to the end that it may be enforced. The court should, as far as possible, put itself in the place of the parties when their minds met upon the terms of the agreement, and then from a consideration of the writing itself, its purpose, and the circumstances which conditioned its making endeavor to ascertain what they intended to agree to do—upon what sense or meaning of the terms they used their minds actually met."

Mr. Justice Sanborn then proceeds to state that the intention must be gleaned from a consideration of the whole instrument and from all of its provisions, and not only from certain parts or fragments, and that all parts should be harmonized, and then proceeds as follows:

"The actual intent of the parties when thus ascertained must prevail over the dry words, inapt expressions, and careless recitations in the contract, unless that intention is directly contrary to the plain sense of the binding words of the agreement."

The case of *Coghlan v. Stetson* (C. C.), 19 Fed. 727, affords a striking illustration of how far courts sometimes are required to depart from the mere dry words used by the parties in their contracts in order to preserve their real intention and to prevent injustice. Mr. Justice Coxe, in speaking for the court in that case, at page 729, says:

"The interpretation contended for by the defendant is so harsh, so unfair, so wanting in reciprocity that the court should not hesitate to reject it, provided the instrument is susceptible of any reasonable construction. . . . If the language used clearly establishes the defendant's version, it would unquestionably be the duty of the court to enforce it. But where the exact meaning is in doubt, where the language used is contradictory and obscure, if there are two interpretations, one of which establishes a comparatively equitable contract and the other an unconscionable one, the former construction should prevail." 2

We are fully aware that counsel for respondents insist that their version of the contract in question is not unfair, unjust, nor ambiguous. With this contention we cannot agree, and we refer to the case just cited from which it appears that

the contract under consideration there was, if anything, less harsh in its consequences, and the meaning of the words used by the parties, in our judgment, was less obscure than is the meaning of the words used in the contract in question, yet the court applied the rule above announced and enforced it. The following cases will be found to fully sustain and enforce the doctrine laid down in the foregoing quotations: *Wash. & I. R. Co. v. Coeur d'Alene Ry. Co.*, 160 U. S. 101, 16 Sup. Ct. 231, 40 L. Ed. 346; *Salt Lake City v. Smith* 104 Fed. 457, 43 C. C. A. 637; *Pressed Steel Car Co. v. Eastern Ry. Co.*, 121 Fed. 611, 57 C. C. A. 635; *American Bonding Co. v. Pueblo Inv. Co.*, 150 Fed. 27, 80 C. C. A. 97, 9 L. R. A. (N. S.) 557. See, also, 17 A. & E. Ency. L. (2d Ed.), pp. 2, 17, where the doctrine is admirably stated. We might cite and quote from numerous other cases, but a reference to the foregoing is quite sufficient to illustrate the principle we are invoking. Moreover, as is well stated by Mr. Page in his excellent work on Contracts, concrete cases are, as a rule, valuable only for the purpose of illustrating the rules of construction, and that, except in particular kinds of contracts, each case must, to a large extent, be determined upon the peculiar phraseology of the contract in question and the peculiar circumstances surrounding the parties.

Considering the contract in question in the light of the foregoing rules, what was the real intention of the parties at the time they entered into the agreement? It is clear, we think, that the parties at all events intended that the agreement in question should constitute a sale and transfer of the option from respondents to appellant. Basing their contention upon this conclusion, counsel for respondents insist that from this it necessarily follows that the \$200,000 was intended as the consideration or purchase price for the option, and that this purchase price was payable at the happening of the events mentioned in the agreement, but in case the events did not happen the obligation to pay was, nevertheless, absolute, and hence the payments should be made when the events, by mere efflux of time, should have happened.

To sustain this contention counsel have cited a large number of concrete cases, which, they contend, are decisive of the controversy in their favor. We have examined all of the cases cited by them with much care, and we confess our inability to agree with them that the principles enunciated in those cases at all determine the controversy in their favor. Let us briefly review a few of those cases and see what is in fact decided in them.

The leading case cited by counsel is the case of *Alvord v. Cook*, 174 Mass. 120, 54 N. E. 499. The action there reported was one to recover commissions claimed by a real estate broker against the vendor for a completed contract for the sale of certain real estate. A part of the commission was paid at the time of the transaction, and the remainder was to be paid when the property was actually transferred from the vendor to the vendee. This transfer was never made, the vendor and vendee, for some reason, having mutually abandoned the agreement of sale. When the broker, therefore, demanded his commission, he was met with the claim that the event had never taken place, the happening of which marked the time when the commission was to be paid, hence there was no commission due or payable. Of course the court was not led astray by any such a subterfuge, but required the vendor to pay the broker his commission. The decision is, however, in effect, based upon the ground that the broker had done all he was required to do; that the commission was fully earned, and there was in fact an enforceable contract entered into between the vendor and the vendee which was abandoned by them; that the time of the transfer of the property was fixed as the time for the payment of the commission, and not as a condition the happening of which was to determine whether the broker should receive any commission at all. The court held that the abandonment of the original contract of sale by the vendor and vendee was no reason why the broker should not be paid his commission which was to be paid when the transfer of the property should be made. The time when the transfer of the property was

to be made was fixed as the time when the commission, then fully earned, should be paid. The making of the transfer thus only marked the time when an existing debt should be paid and was not intended as a condition precedent which must arise before a debt exists or an obligation to pay arises. In that case the commission being fully earned became payable when the transfer of the property under the agreement should have been made, and if this transfer was not made the law nevertheless implied a promise to pay.

The next case is *Page v. Cook*, 164 Mass. 116, 41 N. E. 115, 28 L. R. A. 759, 49 Am. St. Rep. 449. The action was one to recover on a promissory note which was made payable "when payor and payee mutually agree." The defense was that the payor had not agreed to pay, and hence the note was not due and the action was premature. The court again held that the promise was an absolute promise to pay; that to construe the words literally made the contract unfair and wholly unreasonable, and hence the parties must have intended that the payment should be made within a reasonable time, and the law implied such a promise.

The next case is *Eaton v. Yarrowborough*, 19 Ga. 82. The agreement sued on in that case was that the promisor would pay the debt "as soon as he finished the Methodist church which he was building in Rome." The promisor died before the church was completed, and when the administrator of the promisor's estate was sued he defended upon the ground that the condition upon which payment was to be made had never happened, and hence the estate was not liable. The Supreme Court of Georgia, however, held "that the promisor referred to the completion of the church by him as a time of payment, and not as a condition upon which only the note was payable." It was accordingly very properly held that the estate was liable for the debt.

The next case is *Crooker v. Holmes*, 65 Me. 195, 20 Am. Rep. 687. The action was based upon a promissory note made payable "when I sell my place whereon I now live in Oxford, Maine." To this was interposed the same defense

as in the preceding cases, and the court held that the plaintiff could recover for the reasons stated in the cases referred to.

The last case from which we shall quote is *Haines v. Weirick*, 155 Ind. 548, 58 N. E. 712, 80 Am. St. Rep. 251. In this case the promisor was sued on an agreement to pay a specific debt when a certain heir should attain the age of twenty-one years. The heir died before arriving at that age, and the defense was that the promisor was not required to pay. The court, as a matter of course, held the promisor liable. The question as to whether the promisor was obligated to pay at all events was not made dependent on whether the heir should live to be twenty-one years old, but it was to mature when he did arrive at that age, and this merely marked the time when a subsisting debt became payable and thus enforceable.

The following cases, also cited by respondents, all in some way illustrate the principles upon which the cases last quoted from are based: *Noland v. Bull*, 24 Or. 479, 33 Pac. 983; *Hicks v. Shouse*, 55 Ky. (17 B. Mon.) 483; *Randall v. Johnson*, 59 Miss. 317, 42 Am. Rep. 365; *Crass v. Scruggs & Co.*, 115 Ala. 258, 22 South. 81; *Hood v. Hampton, etc., Co.* (C. C.), 106 Fed. 408.

There is one controlling element illustrated in each of the foregoing cases, which is, that the courts, whenever possible, will enforce the contracts of the parties in accordance with their intention at the time the contract was entered into, if such intention can be ascertained from the language used by them when viewed and applied in accordance with the rules of construction we have heretofore referred to. Further, that the mere dry words of the contract are not alone controlling in determining the sense in which the parties intended them. Of course, courts may not in effect reform contracts under the guise of construing them, but when the intent is clear, when all of the provisions of the contract are considered, then merely to enlarge or to restrict the ordinary

meaning of words is not reforming the contract but is rather enforcing the precise contract made by the parties.

If, therefore, we apply the rules of construction as they are made to appear from the authorities herein cited to the contract in question, and in connection therewith consider the principles upon which the decisions to which we have referred are based, can the judgment of the lower court, in view of those rules and principles, be sustained? Referring, thus, directly to the contract in question, what was it that respondents offered to sell and appellant agreed to purchase? It was a mere option, a right to purchase something of value at some future time at a price then fixed. The property which respondents had the right to purchase was not of a known or fixed market value, but its value was speculative. Speaking in general terms, this value depended upon the quantity and quality of the ores in the underground workings of the mine, the cost of mining and reducing such ores so as to make them marketable, and the market price of the metals when reduced, which price was a fluctuating one as appears from the evidence. Neither the respondents nor the appellant knew the value of the property either at the time when the option was obtained or when it was transferred from respondents to appellant. The purchase price was fixed at \$1,000,000. This might be either far in excess or far below the real value of the property. Respondents had, however, the exclusive right to purchase this property for the price aforesaid for a period of sixty days from the 17th day of January, 1907, and if the mine was worth a large amount in excess of said \$1,000,000, then the right was a valuable right. On the 7th day of February, 1907, this right, however, was limited to the period of thirty-nine days, and unless respondents could dispose of their option within that time the right ceased to have any value at all. They insist, however, very strongly, that the mine may have been of a value far in excess of the price fixed for it, and hence a party desiring to purchase the mine at that price would be inclined to pay a large value for the right itself, and

hence, they assert, this is just what appellant did, namely, that he purchased and agreed to pay the \$200,000 unconditionally for the right to purchase. If appellant did this, he should be required to pay what he agreed to pay. But is the contention that the option, at the time appellant purchased it, was necessarily valuable really a determining factor in the case from which we ought to say that for that reason appellant agreed unconditionally to pay the sum of \$200,000 therefor? If we assume that the option was valuable, or that appellant thought so, which, for the purposes of this argument, would amount to the same thing, would it be reasonable to assume that from that fact alone appellant, as a prudent business man, would unconditionally agree to pay the sum of \$200,000 for the right to purchase certain property of unknown and speculative value, which right, by its own terms, must terminate within thirty-nine days from the time he acquired the right? At the very time, at least, one other party had refused to take up the option at the price therein stated, as is shown by the evidence in the record. If the option was not taken up within the time fixed, appellant, as well as all others, would have the right to negotiate with the owners of the property and thus get an opportunity to purchase it. True, this might be at an advanced price; but whether this would be so or not was, in the nature of things, problematical merely. But, whatever the value of respondents' option was, unless they could sell it within the remaining thirty-nine days it was of no value to them or any one else. This they knew; and the appellant likewise knew. Again, the property consisted of a mine which was being worked and developed at the time, and had been so for some time prior thereto. The owners thereof must have known more about the actual value of the property than either appellant or respondents, and thus, when the owners fixed the selling price at \$1,000,000, they evidently thought that that was a fair selling price, and that such would be the case for a period of at least sixty days from the time the option was given. The parties to the contract in question were

therefore dealing with things whose value, in the very nature of things, was uncertain and speculative. The price fixed was a very large sum of money, all of which had to be paid within a comparatively short period of time. Both parties to the contract then knew that at least only a limited amount of the purchase price could be gained from the mine itself and that the time in which the payments had to be made was a comparatively short time in which to raise so large a sum of money. It is a matter of universal knowledge that \$1,000,000 mining transactions, where the full consideration is paid in money within a period of time such as fixed in the option in question, are rare. But whether rare or not, all know that a deal which involves \$1,000,000 of actual money is one of such magnitude that a man would enter upon with much care and circumspection. Moreover, the competitors for such a prize, if it indeed be one, are limited. Only a few can compete. Is it reasonable, therefore, to assume that a man, regardless of his wealth or resources, would unconditionally agree to pay the sum of \$200,000 for the mere right to purchase for the period of only thirty-nine days property of unknown and uncertain value, the price of which was fixed at \$1,000,000, all of which had to be paid in cash within eight months from the time the option was entered into? We do not hesitate to say that all reasonable men would agree that no reasonably prudent business man would enter into such an agreement. Did the appellant agree to do this? Again we say no.

Recurring, now, for a moment to the language of the contract itself, what is it that the parties there said? They start out with apt language indicating that respondents agree to and do sell and transfer to appellant a right or option for the sum of \$200,000. That the wording of the contract constitutes a sale, and that the consideration named was \$200,000 is quite clear. But the parties also proceed to state that for the consideration of \$200,000 "said first parties (respondents) do by this conveyance for the consideration therein named convey the following described mining property and

claims to the said second party (appellant), to-wit." Then follows a long description of the property. Will any one contend that the language above used can be literally construed and applied? Clearly not. The contract as a whole is still merely a sale or transfer of a right or option to purchase, regardless of the inapt expressions just referred to. This is so, since, from the whole instrument and from the situation of the parties when the contract was entered into such was their ruling intention. Respondents, therefore, neither actually sold and conveyed nor actually agreed to sell and convey to appellant anything except the option to purchase certain specified property at a fixed price to be paid to the owner of said property. In other words, respondents transferred to appellant just what they had, namely, a mere right to purchase certain property. They had neither title nor interest in the property itself. All they had was a right to acquire the title thereto by paying a specified consideration within a fixed time. From the agreement, however, when literally construed, one would infer that respondents undertook to sell or convey to appellant some interest in and to some specific property instead of a mere right to acquire such interest. The language of that portion of the contract to which we have referred cannot be given its usual or ordinary meaning; that is, it cannot be literally construed and applied.

Passing, now, to that portion of the contract in which appellant promises to pay, does it contain a conditional or unconditional promise to pay the sum of \$190,000? This part of the contract must, in the nature of things, be considered in connection with the option which appellant obtained from respondents since it expressly refers to it. In the option contract the time when the \$1,000,000 purchase money for the property if purchased should become due and payable is stated. The principal sum was payable in four installments, the first of which was for \$245,000 and the other three for \$250,000 each. In framing this part of the contract, the parties, in view of its importance, might well

have exercised more care, and thus have been more specific in stating the terms of the agreement. And it is to be regretted that this was not done. This, however, does not change the terms of the agreement. We think that, with what is expressed and clearly implied in view of the circumstances disclosed by the evidence, the terms of the contract are not so obscure or ambiguous that the ruling intention of the parties cannot be ascertained therefrom. In one sense the parties in this case did what the Massachusetts court said was done by the parties in the case of *Alvord v. Cook*, *supra*. In that case it was assumed that the transfer of the property would be made. It was therefore stipulated that when the transfer should take place the commission should be payable. It must be remembered, however, that in that case there was an enforceable contract of sale entered into, while in the case at bar such a contract was merely in contemplation, and it was optional with the appellant whether he would enter into a binding contract of purchase or not. All this was in the minds of the parties, and, in view of this, it is not reasonable to assume that they would treat a mere option to purchase as tantamount to a completed contract of sale. In referring, therefore, to the time when the payments under the option should be made, it is both reasonable and natural to assume that the parties referred to the making of such payments as a condition upon which the remaining \$190,000 should become payable, and not merely as a time limit beyond which appellant could not defer the payment of that sum. In other words, the parties contemplated that a binding contract of purchase and sale of the mining property should be entered into under the option before it should become obligatory upon appellant to pay any part of the \$190,000. This condition is, we think, clearly implied in the agreement, and is therefore as binding as if expressed in apt terms. The real intention, therefore, was not that upon the happening of an event an existing debt should be paid, but it was that at said time an obligation should be created which was to be discharged at the

same time. This constitutes the distinguishing feature between this and all other cases that counsel for respondents have cited and to which we have referred. We think that, in view of the language contained in the whole agreement and the circumstances we have herein referred to, the foregoing conclusion is not only justified, but that it is the only fair and rational conclusion that is permissible. In the agreement a payment of \$10,000 is provided for to be made "upon the execution of this agreement." At this point in the agreement the whole controversy arises. It is a matter of some significance that the whole of the remainder of the \$200,000 is required to be paid in installments corresponding in number and in time of payment with the payments that are to be made in case the option to purchase is taken up. If the payment of the remaining \$190,000 was an absolute and not a conditional obligation to pay, then there was no reason, at least none of importance, why the payments should be made at the same time that the payments on the purchase price of the property were made. If, upon the other hand, the obligation to pay the remaining \$190,000 was conditional and dependent upon the fact of the payment of the purchase price of the property—that is, if the \$190,000 was in the nature of a commission to respondents in addition to the \$10,000 already paid to them—then there were very good, if not controlling, reasons why the remainder of the \$190,000 should be paid when the property was paid for. The language is that the first payment on the remaining \$190,000 is to be made "at the time when the said second party shall be required to pay to the Ludwig Copper Mining Company the first payment under the terms of said written agreement or any modification thereof as to the time of payment." The controlling words in the quotation, in view of the whole instrument, in referring to the payment to be made by appellant to the copper company, are "shall be required." Whether appellant was to pay the first \$40,000 of the \$190,000 was thus made to depend upon whether appellant should be required to pay the purchase price of the property to said

copper company. This was not merely referring to an event the happening of which fixed the time of payment of an existing debt, but it amounted to the statement of a condition upon which the liability to pay the \$40,000 was made to depend, namely, if appellant became obligated to pay the purchase price of the mine, then he also became obligated to pay the \$190,000 and unless he assumed the first obligation the last did not arise. If, however, the first obligation was assumed, then the last would have to be discharged simultaneously with the first. This view is, we think, strengthened by what is said about the payments of the remaining \$150,000 of the \$190,000. This \$150,000 was to be paid in "proportionate amounts on the dates when the payments *are made* by the said second party . . . to said copper company." (Italics ours.) Here, again, the language implies that the obligation to pay respondents is conditioned on whether the payments to the copper company are made, for the reason that it is assumed that said payments will be made, and therefore it is said that respondents are to be paid when the payments to the copper company "*are made.*" It is, therefore, quite clear to us, under the authorities which we have cited, if appellant had in fact exercised his option to purchase the mining property from said copper company, and thus became obligated to pay the consideration therefor, that in such event the obligation to pay the respondents would have become absolute and, whether he made the payments to the copper company thereafter or not he would still have been required to pay respondents. This would be so, however, because the condition upon which appellant's liability depended had arisen, and when this had taken place the obligation to pay became absolute, and the appellant could not escape thereafter by merely refusing to make the further payments or to comply with the conditions of his contract. But it seems to us that it was clearly implied, in view of the language used in the agreements, and from the circumstances to which we have referred herein, that the obligation to pay respondents any part of

the remaining \$190,000 was not to arise unless appellant exercised his right to purchase the mining property under the option he had obtained from respondents, and thus, in the language used by them, "shall be required to pay" said copper company. Why use the phrase "shall be required to pay" with respect to the first payment, and the phrase "when the payments are made" with respect to the other payments, if the parties did not intend that whether any obligation to make first payment should arise or not depended on whether appellant would obligate himself to pay said copper company? The parties in substance stated that appellant would not become obligated to pay respondents 3 unless he purchased the mining property under the option agreement and thus should "be required" to pay the copper company the purchase price.

Counsel for respondents have also invoked the rule of construction usually termed "the rule of *contra proferentem*." Under this rule it is in effect contended that when a party in a written agreement chooses his own language in assuming an obligation, the language should be construed more strongly against the one who had the choice of words and who assumed the obligation. This rule is not favored by the courts, and will only be invoked in extreme cases and as a last resort. Besides, it is, as a general thing, invoked only in deeds poll, in insurance contracts, in contracts to avoid forfeitures, and in contracts that are not favored by law. Moreover, in order to make the rule applicable at all, it must appear on the face of the contract that the party against whom the rule is invoked made use of the language. Contracts, therefore, in which the parties thereto make mutual promises do not ordinarily come within this rule. (2 Page on Contracts, sec. 1122.)

Respondents also seem to lay much stress upon the fact that on the 15th day of February, 1907, when appellant paid them the \$15,000 to which we have herein referred, a voucher to which a receipt was attached was presented to one of the respondents for signature. The voucher recited that it

was "payment on account for assignment of Ludwig option as per agreement of even date herewith. \$15,000.00." The receipt read as follows: "Received of F. J. Hagenbarth fifteen thousand (\$15,000.00) dollars in full payment of the above account." When the voucher and receipt were presented to Mr. Caine for signature, he changed it to read as payment "on account" instead of payment in full. Mr. Caine says that the appellant was present when the change was made and acquiesced in it, while appellant denies this, and says that he did not know of it until this action was begun. We confess that we are unable to see much force to respondents' contention. In the first place the transaction occurred at least seven days after the contract in question was written and signed. The mere fact that the contract was not enforceable until after the aforesaid transaction took place, which perhaps constituted a delivery of it, could in no way change either the sense of the language used or the intention of the parties. The conditions stated in the contract remained precisely the same after the transaction as they were written therein before the transaction took place, and nothing is discoverable from the transaction itself which would be a modification of any terms of the written agreement. In the second place, we cannot see in what way the change made in the receipt from the recital that it was payment in full to that that it was payment on account merely changed anything. Both recitals were correct, depending solely upon how the transaction was viewed. If appellant took up the option, then it was clearly only part payment of the \$200,000, and if he did not, then it was payment in full for the option. The mere fact, therefore, that, under the circumstances, the receipt was made to read one way or the other in no way affects the construction that is to be placed upon the contract which was executed some days before.

In view of the amount that is involved in this and in another case upon the contract in question, and in view that counsel on both sides argue with much force and ability that the right is with them, we have given the questions involved

even more than ordinary consideration and care. The more that we have reflected upon the questions involved and the more we have considered the language contained in the contract when viewed in the light afforded by the subject-matter and the surrounding circumstances herein detailed, the more have we become convinced that appellant's contention ought to prevail, and that the trial court, in construing the language contained in the contract, overlooked the doctrine which is well expressed in the scriptural text, that it is "not of the letter, but the spirit; for the letter killeth, but the spirit giveth life."

For the reasons herein stated we are convinced that at the time the agreement was entered into it was not the intention of either respondents or appellant that he should be bound to pay any part of the remaining \$190,000 unless he purchased the mining property upon which he obtained the option from respondents. We are further convinced that if such a promise had been squarely demanded by the respondents from appellant, he would have promptly refused to make it. Moreover, the demand of respondents, in view of what they had to sell and did sell, is unfair, unjust and wholly inequitable. For this reason, if for no other, therefore, we may well invoke the doctrine laid down by the Supreme Court of the United States in the opinion in *Noonan v. Bradley*, 9 Wall., where, at page 407 (19 L. Ed. 757), Mr. Justice Field states it in the following language: "When an instrument is susceptible of two constructions—the one working injustice and the other consistent with the right of the case—that one should be favored which standeth with the right."

From what has been said it necessarily follows that the judgment of the district court ought to be, and it accordingly is, reversed. The case is remanded to that court with directions to grant a new trial. We are also of the opinion that in this case, in view of all the circumstances, neither party

should recover costs from the other on this appeal. It is so ordered.

STRAUP, C. J., and McCARTY, J., concur.

ON APPLICATION FOR REHEARING.

FRICK, J.

Respondents have filed a petition for a rehearing. It is contended that as the opinion now stands it is uncertain whether we held the contract passed on ambiguous or otherwise. We think it is manifest from the opinion that we considered the contract in question as belonging to that class where it is permissible to resort to proper extrinsic evidence of the surrounding facts and circumstances, 4 the nature of the subject-matter, the relations of the parties to the contract, and the purposes sought to be attained thereby, as an aid to the court in arriving at the real intentions of the parties. In our opinion, therefore, there is no merit whatever in the contention, and the application for a rehearing is denied.

STRAUP, C. J., and McCARTY, J., concur.

CAINE et al. v. HAGENBARTH.

No. 2093. Decided January 6, 1910 (106 Pac. 954).

APPEAL from District Court, Third District; *Hon. T. D. Lewis*, Judge.

Action by Joseph E. Caine and another against F. J. Hagenbarth.

Judgment for plaintiff. Defendant appeals.

REVERSED AND REMANDED, WITH DIRECTIONS.

Dickson, Ellis, Ellis & Schulder for appellant.

C. S. Price and Van Cott, Allison & Riter for respondents.

FRICK, J.

This action is based upon the same contract which was involved in the case between the same parties that we have just decided and which precedes this one. (106 Pac. 945.) All the questions that are involved on this appeal were involved and have been decided in the case aforesaid. This case, therefore, is controlled by the decision in that case. Upon the authority of that case the judgment is reversed, with directions to the trial court to grant a new trial. It is further ordered that neither party recover costs on appeal.

STRAUP, C. J., and McCARTY, J., concur.

RYDALCH V. ANDERSON.

No. 2054. Decided January 6, 1910 (107 Pac. 25).

1. **ADVERSE POSSESSION—REQUISITES—PAYMENT OF TAXES.** Where land had been occupied under a claim of right for about twenty-four years, so as to acquire title under Comp. Laws 1876, secs. 1097-1104, requiring seven years' adverse possession to acquire title, when Comp. Laws 1888, secs. 3137, effective in 1888, was enacted, making payment of taxes essential to the acquisition of title by the adverse possession, title by adverse possession was complete without the payment of taxes, either during the adverse holding or thereafter.¹ (Page 106.)
2. **BOUNDARIES—ESTOPPEL BY ACQUIESCENCE—PERSONS ESTOPPED—HEIRS.** An heir would be estopped by his ancestor's acquiescence in an agreement with an adjoining landowner as to their boundaries, if the ancestor himself would be estopped. (Page 109.)
3. **BOUNDARIES—ESTOPPEL BY ACQUIESCENCE—EFFECT OF SUBSEQUENT ACTS OF PARTIES.** The predecessors of defendant and plaintiff located land on sections 23 and 26, respectively, before it was surveyed and the section line run, and in 1865 they agreed upon a triangular line as the boundary, and erected a fence on the line. Thereafter the land was surveyed and the government section line run so as to cut through the triangular line, but as to the part of the land in controversy, the line as originally established and fenced was recognized and acquiesced in as the true line from the time it was established to 1905. *Held*, that defendant was estopped from claiming title to the tract in controversy within the triangular line fenced in 1865 to the extent that the parties had continued to treat it as the boundary line, and that they thereafter abandoned in part the original line and accepted the section line as the boundary for a part of the distance on either side of the tract in controversy, or that defendant's deeds from his predecessor did not refer to any land in section 26, was immaterial?² (Page 110.)
4. **BOUNDARIES—ESTOPPEL BY ACQUIESCENCE.** Whether one is estopped from claiming land beyond an agreed boundary acquiesced in by him must be decided largely upon the particular facts of the case, and no absolute rule can be applied to every case. (Page 113.)
5. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE—EVIDENCE ON COLLATERAL MATTERS.** In an action to quiet title to land, in which

¹ R. G. Wl. Ry. Co. v. Salt Lake Inv. Co. (Utah), 101 Pac. 590.

² Holmes v. Judge, 31 Utah, 269, 87 Pac 1009.

defendant claimed to a certain fence, fixed as the boundary by the parties' predecessors, defendant testified that before he purchased from the heirs of his predecessor they stated that their land was bounded by the fence. Plaintiff filed with his motion for a new trial an affidavit of one of such heirs, to the effect that when defendant purchased from the heirs, affiant told him that the fence was not the true boundary, and they would sell only what they owned. *Held* that, even if the statement contained in the affidavit was newly discovered evidence, it was not such as to require a new trial, as its only effect was to contradict defendant's testimony on a collateral matter. (Page 114.)

6. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—PROBABLE EFFECT.

Where alleged newly discovered evidence for which plaintiff sought a new trial would merely affect defendant's credibility as a witness, and would not change the result even if defendant's testimony on the question to which the newly discovered evidence related was eliminated, it was not ground for requiring a new trial. (Page 115.)

7. NEW TRIAL—MISCONDUCT OF PARTIES.

In an action to quiet title, in which defendant claimed to a certain fence alleged to have been fixed and acquiesced in as the boundary by the parties' predecessors, defendant served notice on plaintiff for the taking of a nonresident's deposition, but did not afterwards have it taken, and plaintiff produced the affidavit of such person in support of his motion for new trial, stating that he told defendant when the latter purchased from him that the fence was not the true boundary line between his and plaintiff's land. *Held* that, in absence of a further showing by the record, defendant's failure to take the deposition of such witness after serving notice, and to inform plaintiff's counsel thereof, would not authorize a new trial on the ground of misconduct. (Page 115.)

8. JUDGMENT—CONFORMITY TO ISSUES.

Where, in an action to quiet title, in which defendant claimed that a certain fence was the boundary, the pleadings and evidence did not raise the question as to defendant's right to have plaintiff erect a fence upon the boundary line to which defendant claimed, the decree for defendant improperly required plaintiff to erect such fence. (Page 115.)

APPEAL from District Court, Third District; *Hon. M. L. Ritchie*, Judge.

Action by John Rydalch against C. Le Roy Anderson, administrator of the estate of Charles L. Anderson, deceased.

Judgment for defendant. Plaintiff appeals.

AFFIRMED AS MODIFIED.

Hurd & Hurd for appellant.

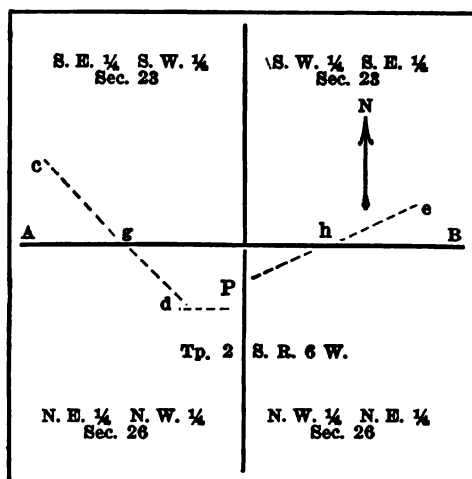
Evans & Evans for respondent.

FRICK, J.

This is an action to determine an adverse claim to 38.86 acres of land, of which appellant claimed to be the owner in fee, and in which he alleged one Charles L. Anderson claimed some interest. After the case had terminated in the district court, and about the time the appeal was filed in this court, said Anderson died, and C. Le Roy Anderson was substituted for the deceased. We make this explanation at this time for the reason that, notwithstanding the death of the original party defendant as aforesaid, we shall hereafter in this opinion refer to the deceased as respondent.

Respondent, in his answer, denied that appellant was the owner of the entire 38.86 acres, and, by way of counter-claim, set up title to a triangular parcel of land included within said 38.86 acres in himself. Respondent claimed title to said parcel by adverse possession, and also by reason of the establishment of a boundary line between appellant's and respondent's land, which had been established and acquiesced in for a period of forty years by the predecessors in interest of the lands now owned by appellant and respondent, and particularly the land in controversy.

The following diagram will show the precise location of the parcel of land in controversy, and will also show the alleged boundary line, and will thus help to illustrate the questions to be decided.



The line marked A, B is the section line between sections 23 and 26, township 2 S., range 6 W., of the Salt Lake Meridian, Tooele County, Utah. The evidence does not show the precise time, but some time prior to 1865, the predecessor in interest of respondent, a Mr. Kimball, located upon and took possession of the lands shown in the diagram as being in section 23, and one William C. Rydalch, the father of appellant, and under whom he claims as an heir, located on and took possession of the lands shown in the diagram as being in section 26. From the evidence it is made to appear that when the lands were located as aforesaid by Mr. Kimball and Mr. Rydalch, no government survey thereof had been made, and hence had not been subdivided into sections and parts of sections. By reason of this fact Mr. Kimball and Mr. William C. Rydalch established a boundary line between the lands located and claimed by each of them. This line was established by what a witness designates as a "rope survey." By this so-called survey a line was established, which appears on the diagram as a broken or dotted line, indicated by the letters "c," "d," "e." In 1865 or 1866 a fence was erected on the line aforesaid, which, the evidence shows, at one time may have extended

easterly beyond the point "e," and also may have extended westerly beyond the point "c." The court found, and we think the finding is supported by some evidence, that William C. Rydalch maintained the easterly, while Mr. Kimball maintained the westerly, portion of the fence while they lived. Mr. William C. Rydalch died in 1900 or 1901. One of his sons, who lived on or near the land for fifty years, when asked about the fence, testified, "My father had it built." This son also testified that his father, for thirty or forty years, had always maintained a fence along the boundary line in question, and that Mr. Kimball had always claimed, used, and occupied the land to the north of the fence, and that Mr. William C. Rydalch always used, claimed, and occupied the land south thereof. Another witness testified that he knew of the fence for many years; that in 1894 Mr. William C. Rydalch, the father of appellant, employed the witness to plant some poplar trees along the line of the fence; that Mr. Rydalch, at the time, told the witness that he (Rydalch) wanted a row of trees planted on the line between Mr. Kimball's and Mr. William C. Rydalch's lands; that he told the witness to plant the trees along the line of the fence, and that the witness planted them as directed; that some of the trees were standing and growing at the time of the trial, while others, and especially those planted on the higher or dry part of the land had died. This witness also testified that the fence was a post and pole fence, and was maintained as aforesaid.

The land in controversy is the triangular parcel marked P, bounded by the lines marked "g, h," "h, d," and "d, g," as shown on the diagram, and contains 4.68 acres. The record title to the land in section 26 shown on the diagram, at the time of the death of William C. Rydalch, the father of appellant, was in said Rydalch, as appears from a United States patent issued to him April 25, 1871, by which there was conveyed to him the N. E. quarter of section 26, township 2, S., range 6 W., S. L. M., in Tooele County, Utah. It was also conceded at the trial that a patent had been duly

issued whereby the E. half of the N. W. quarter of section 26, township and range aforesaid, was duly conveyed to said William C. Rydalch. The evidence does not disclose the date of the later patent, but the court found that it was issued February 2, 1888, and recorded on September 2, 1889. The record title of appellant to all of the land in section 26, including the triangular parcel marked "P" on the diagram is not questioned; and, unless the respondent has acquired title by adverse possession, or unless the title is in him by reason of the fact that that portion north of the fence was, by the respective owners of the land on the north and south thereof, for all practical purposes, determined to be a part of section 23, the appellant should succeed in this action.

In this connection respondent testified that he purchased the land north of the fence in 1898 from the Kimballs; that when he purchased the land the fence was intact, and that he was told by some of the Kimball heirs that all of the land north of the fence was owned by the Kimballs; that he himself had been familiar with the land and fence for forty years or more, and had always assumed that the land north of the fence was owned by the Kimballs, and the land south thereof by Mr. William C. Rydalch; that respondent purchased the land believing that the triangular strip in question belonged to the Kimballs, and that it was included in the lands he purchased in section 23; that at the time he purchased he took possession of the lands, and used them and remained in actual possession thereof up to the time of trial, except for a short time in May, 1905, when appellant, during respondent's absence from the state, broke down a portion of the fence and entered upon the triangular parcel in dispute; that he paid all the taxes assessed against the land he purchased but that he was never assessed on any land in section 26, but said that he thought that the assessor assessed the land north of the fence as belonging to respondent.

The findings of the court are very full and explicit. Among others, the court, in substance, found as follows: That for forty years before the commencement of this action the par-

cel of land marked P on the diagram was within the inclosure of respondent and his predecessors in interest, and was separated from the lands of appellant by the fence shown on the diagram; that during all of the time aforesaid respondent and his predecessors in interest have used said parcel of land in connection with the other lands owned by the Kimballs and by them conveyed to respondent; that said use was open, continuous, and without any interference from any one, and the use of said parcel as aforesaid was acquiesced in by all until questioned by appellant in 1905; that the fence in question remained in practically the same place since it was established in 1865, and from said time forward was always kept in repair; that respondent and his predecessors in interest were in possession of said parcel of land under a claim of right, claiming title thereto during all of the time aforesaid against all the world except the United States. The court also found that in 1898, when respondent purchased the land from the Kimballs, the section corners and lines of sections 23 and 26 were well established, and were easily ascertainable. We remark here that the fact appears to be, as hereinbefore stated, that in 1865 sections 23 and 26 had not been surveyed, but in view that the first patent was issued to Mr. William C. Rydalah in 1871, it would seem that the lands must have been surveyed some time prior to that time. We remark, further, that while the second patent was not issued to William C. Rydalah for a part of the land in controversy until 1888, there is absolutely nothing to show at what time prior to the issuance of said patent he may have complied with the laws of the United States which would entitle him to a patent. Upon the findings the court entered judgment quieting the title to the parcel of land in question in respondent, and appellant presents the record for review on appeal.

The principal assignments of error relate to the findings of fact and conclusions of law as found by the court and the overruling of appellant's motion for a new trial. Appellant's contention that the findings of fact are not supported

by the evidence is, in our judgment, not tenable. The evidence is all one way, and we cannot see how the court could well have found the facts otherwise than he did. The only question, as we view the matter, therefore, is whether the court's conclusions of law, deduced from the undisputed facts, are sound.

The effect of the contention is that the conclusions of law and judgment are erroneous for the following reasons: (1) That the record title is conceded to be in appellant; and (2) that respondent did not establish title in himself by adverse possession because he did not prove that he had paid the taxes assessed against the parcel of land in question, as required by the statutes of this state. Conceding the foregoing statement to be correct, is the judgment necessarily erroneous? As we have seen, the title of the northeast quarter of section 26 passed from the United States to appellant's father in April, 1871. Both the legal and record title to that portion of the triangular parcel in question which is in the quarter section aforesaid, were thus in appellant's father, and not in the United States, since April, 1871. The statute requiring the payment of taxes as a prerequisite to acquiring title by adverse possession in this state went into effect in 1888. (Section 3137, Comp. Laws 1888; *R. G. W. Ry. Co. v. Salt Lake Inv. Co.*, 35 Utah, 528, 101 Pac. 590.) From the findings of fact, based, as we think, upon the undisputed evidence, the Kimballs, the predecessors in interest, and under whom respondent claims, were in actual possession under a claim of right of the parcel of land in question from a time prior to 1865. They were thus in continuous possession of the parcel for a period of about twenty-three years before the statute requiring the payment of taxes went into effect, and for a period of seventeen years after the title had passed from the United States to William C. Rydalph for that portion included in the patent of 1871. Prior to the time when the statute in question went into effect, seven years' adverse possession without the payment of taxes was sufficient to acquire title to real property in this

state. (Comp. Laws 1876, pp. 363-365, secs. 1097-1104.) The section adopted in 1888 was, in all probability, taken from the State of California. The California Supreme Court, in construing the statute, has repeatedly held that, if the statutory period of adverse possession had fully run when the statute requiring the payment of taxes went into effect, the title by adverse possession was complete without the payment of taxes, and that it was immaterial whether the taxes were subsequently paid or not. (*Webber v. Clarke*, 74 Cal. 19, 15 Pac. 431; *Johnson v. Brown*, 63 Cal. 392; *Sharp v. Blankenship*, 59 Cal. 288; *S. P. Ry. Co. v. Whitaker*, 109 Cal. 273, 41 Pac. 1083; *Allen v. McKay & Co.*, 120 Cal. 332, 52 Pac. 828.) This doctrine is confessedly sound, if for no other reason than the one that when the statute in force prior to 1888 had fully run, the right to the property held by adverse possession became a vested right, which could not be affected by a subsequent change of the law. The title by adverse possession to that portion of the triangular portion which is a part of the N. W. quarter of the N. E. quarter of section 26 was therefore complete in respondent's predecessors in interest long before the statute of 1888, requiring the payment of taxes, went into effect. Under the findings and the undisputed evidence respondent's title by adverse possession to that portion of the land just referred to can thus not be questioned. But, in view that the court quieted the title to the whole parcel in respondent, the judgment may still be erroneous.

It must be remembered that the legal title to that portion of the triangular parcel in question which forms a part of the N. E. quarter of the N. W. quarter of section 26 did not pass from the United States to William C. Rydalch, the father of appellant, until 1888. In view of this fact counsel for appellant contend that respondent's predecessors could not acquire title until after the title passed from the United States. If, therefore, the law with respect to acquiring title by adverse possession is as we have just stated it to be, then neither the respondent nor his predecessor in interest could

have acquired title to any portion of land lying in the N. E. quarter of the N. W. quarter of section 26 without the payment of taxes as required by the statute which became effective in 1888. The only proof that respondent did or could make with respect to the payment of taxes was that he paid all the taxes assessed against the land on the north side of the fence since he purchased and went into possession of it in 1898. He, however, conceded that the land was assessed by government subdivisions only, and that he never was assessed, nor paid any taxes, as far as he knew on any land in section twenty-six. Assuming, for the purposes of this decision, that the evidence adduced in this case did not authorize the court to find that the statute with regard to the payment of taxes was complied with, and that therefore title by adverse possession was not established to that portion of the triangular piece above referred to, does respondent's title fail for that reason? Stating the proposition in another form, is the respondent, in view of all the facts and circumstances in this case, required to establish title as against appellant by showing that respondent had paid the taxes required by the statute, or may he in view of the facts and circumstances, successfully claim that appellant is estopped from asserting title to the land north of the fence in so far as the same is included within the triangular parcel in question?

As we have seen, the evidence is undisputed that, for a long time prior to the issuing of the patents referred to, a boundary line between the lands owned by appellant's father and the Kimballs, the predecessors in interest of respondent, had been established. That this boundary was open, and visibly marked on the ground by a fence which appellant's father seemed anxious to maintain and make permanent long after he had obtained title from the United States to the land in dispute, and long after the land had been surveyed, so that he at least had the means of knowledge, if he did not actually know where the government lines were located, is also beyond cavil. That appellant's father, the Kimballs, and respondent, and all interested parties, from 1865

down to the month of May, 1905, had continuously and without question treated the land on the north of the fence as belonging to the Kimballs and their successors, and that south of the fence as belonging to William C. Rydalch and his successors, and that the lands aforesaid by both claimants were used, occupied, and treated the same as owners usually use and occupy their lands, is not open to dispute. The whole world, including respondent, therefore, had a right to assume that the ownership of the land in fact was what those in interest held it out to be. Appellant, as the mere successor of his father, is estopped, if his father would 2 have been. The only question, in view of the facts and circumstances, therefore, is: Would appellant's father be estopped if he survived to claim title to the parcel of land in controversy as against respondent? We are of the opinion that he would be.

The doctrine applicable to the facts is well stated in 1 Cyc. 1034, 1035, as follows:

"Where the proprietors of adjoining lands agree upon, fix, and establish a boundary line between their respective tracts, and each occupies up to the boundary line, their possession is mutually adverse to each other, and, if continued for the length of time prescribed by the statute of limitations, will ripen into a perfect title. Where an agreement of this character exists, it is of course immaterial that the line thus agreed upon is not the correct one. Agreements of this character are not within the statute of frauds, because they are not considered as extending to the title. They do not operate as a conveyance so as to pass title from one to the other, but proceed upon the theory that the true line of separation is in dispute and to some extent unknown, and in such case the agreement serves to fix the line to which the title to each extends."

Again on page 1036, in referring more particularly to the estoppel, it is said:

"In a number of jurisdictions it seems to be well settled that, where a boundary line is established by agreement of two adjoining owners, title up to the line thus fixed may be acquired by estoppel, as well as by adverse possession. Where adjoining landowners agree upon a boundary line and enter into possession and improve the lands accord-

ing to the line thus agreed upon, the parties will be concluded from afterward disputing that the line thus agreed upon is the true one, even if the statute of limitations has not run."

In *Johnson v. Brown*, 63 Cal. 392, the Supreme Court of that state, after discussing the question of acquiring title by adverse possession, on the question of estoppel, at page 393, says:

"Besides, where owners of adjacent parcels of land have occupied, adversely to each other for more than five years, their respective tracts by a division line, which each has recognized and acquiesced in as the true boundary line, during all of that time, either is estopped from afterwards questioning it as the true line."

A number of California cases are cited in support of the foregoing text. It is not necessary to refer to them here. In *Watrous v. Morrison*, 33 Fla., at page 267 (14 South, 807, 39 Am. St. Rep. 143), in speaking of the effect of an agreed boundary line, the Supreme Court of Florida says:

"The line becomes binding, not upon the principle that the title to real estate can be passed by parol, but for the reason that the proprietors have by such consent and conduct agreed permanently upon the limits or the extent of their respective lands or property."

Numerous cases are cited in support of this text. See, also *McNamara v. Seaton*, 82 Ill. 498, where it is held that under such circumstances a party will be estopped claiming to the true line, although the statute of limitations has not fully run. The principle is also recognized by us in the case of *Holmes v. Judge*, 31 Utah, 269, 87 Pac. 1009. Counsel contend, however, that the case last cited is not an authority, for the reason that the case is based upon facts which show that the boundary line there in question was established because the true boundary was unknown to the parties. It is further contended that in the case at bar the facts show that the parties could not have intended to establish a boundary line for the true line because no true line was, at the time, in existence, for the reason that the land

had not yet been surveyed. It is true that where the true line is known parties may not by parol agree upon some other point as the boundary line, and in that way pass title to land by parol. This, however, is not that kind of a case. Neither is it a case where the parties have only provisionally and for convenience agreed upon a boundary line until a permanent one is or can be established, and where both parties intended to claim to the true boundary when established. Under the facts in this case we think the parties had a perfect right to agree upon a boundary line between their claims as they did. They also had the right to readjust this boundary line when the section line was established, which, in view of the recitals contained in the first patent referred to, issued to William C. Rydalch, must have been at least some time prior to 1871. It must therefore be assumed that both Mr. Kimball and Mr. William C. Rydalch knew that the section line had been established and where it was, but that in view of the improvements they had made, or for some other good reason, concluded to continue the boundary line marked by the fence as the permanent boundary line between their lands. By doing so they did not contravene any public statute, nor offend against any public policy, so far as we are aware. To allow either of the original owners, or their successors in interest, to disturb the boundary line without the consent of all the interested parties, after it has been established and maintained by the respective owners of the adjoining properties for forty years or more, would, in our judgment, be conducive of much mischief, and would be contrary to the doctrine laid down in the decisions we have quoted from, and contrary to the great weight of authority, and would be in direct conflict with what we said in the case of *Holmes v. Judge, supra*. In referring to the question of estoppel as applicable to boundary line cases, we, in closing the opinion in that case, said:

"Where parties have, for a long term of years, acquiesced in a certain line between their own and their neighbors' properties, they will not thereafter be permitted to say that what they permitted to appear as being established by and with their consent and agreement was in fact false."

The only difficulty that arises as the question is presented in the case at bar is that only a portion of the originally established boundary line is in question, by reason of which respondent apparently alone will profit, for the reason that on either side of the triangular parcel the section line between sections twenty-three and twenty-six seems to control, and the old boundary line is disregarded. This, however, is a mere incident, and therefore is not of controlling force. If it be assumed that the parties, for any reason, abandoned the old boundary and went back to the section line for a part of the distance, it is no reason why they were not authorized to maintain the old boundary line, as they seem to have done, for merely a portion of its original length. The doctrine of adverse possession and estoppel, as hereinbefore outlined, would apply to the lands affected by the portion of the boundary line which had been maintained. Indeed, it would seem that the estoppel should apply with greater force, for the reason that the original owners, for some reason apparently satisfactory to themselves, deliberately insisted on maintaining the original boundary line as established by them for a part of its original length. In this case it seems clear that the original owners intended to maintain the original boundary line to the extent that it is involved in this action, at all events. Whether the original boundary line throughout its entire length should, or should not, prevail is a matter that is not in issue, and therefore not before us, except incidentally, as indicated.

Nor is the fact that the description of the land which the respondent purchased from the Kimball heirs does not refer to any land in section twenty-six controlling. The original owners, in continuing, as they did, the original boundary line after the government survey, must be deemed to have

intended that all of the land north of the boundary line as they established and maintained the same should be deemed a part of the land of the Kimball heirs. For the purposes of the estoppel which we invoke against the appellant, it therefore can make no difference as between him and the respondent whether the respondent's deeds do or not contain a technical description of the lands purchased by him. So far as the appellant is concerned, it is enough that he is estopped from questioning the respondent's title to the lands north of the old boundary line and included within the triangular parcel of land in question. Each case, as we have pointed out, in *Holmes v. Judge*, *supra*, to a very large extent, must be decided upon its own peculiar facts and circumstances, and for that reason, no hard and fast rule can 4
be laid down which shall control in all cases.

What we have said covers all the assignments, except the one that the court erred in overruling the motion for a new trial, which we will now proceed to consider. This alleged error arises as follows: While the case was pending in the district court, counsel for respondent served notice on counsel for appellant to take the deposition of a witness who lived in the State of Oregon. The deposition was, however, not taken. The proposed witness was a son and heir of Mr. Kimball, the original owner of the lands now claimed by respondent. At the trial respondent, among other things, testified that before he purchased the land some of the Kimball heirs, who were then the owners of the land, said that their land was bounded on the south by the fence to which we have referred. After the case was tried and decided, appellant, in support of his motion for a new trial, obtained the affidavit of the Oregon witness, in which the witness stated under oath that at the time respondent purchased the land from the Kimball heirs the witness informed respondent that the fence was not on the section line, and did not mark the true boundary between the Kimball and the Rydalc lands, and that they (the Kimballs) would sell only

what they owned. Counsel now urge that the court erred in not granting appellant's motion for a new trial upon the statement contained in the affidavit aforesaid. As we have seen, respondent purchased his land in 1898, and he testified that, for many years prior to that time, he was familiar with the land he bought, and with the fence as located on the south thereof, which he assumed to be the south boundary line. When respondent thus further testified what some of the Kimball heirs had told him, he only stated what he had a right to believe, and then and there apprised counsel for appellant of his version of the facts. Counsel thus knew at the trial what respondent's testimony was. If they did not think it was true, and were surprised by it, they should then have applied to the court to postpone further trial of the case until they could obtain the testimony contradictory of respondent's statement. The question of counsel's diligence in ascertaining whether there was any such evidence, and in procuring it, would then have been presented to and considered by the trial court. But counsel say that they did not know that the Oregon witness would testify as stated in his affidavit until after the trial and decision. We shall therefore assume that counsel exercised all due diligence in the matter of discovering the evidence. After assuming that the evidence as contained in the affidavit of the Oregon witness is newly discovered evidence, the question arises: is it of that character for which a new trial should have been granted? We think not. The evidence, in all of its bearings, is at most only contradictory of what respondent said, and that, too, upon a collateral matter. 5

Again, assuming that it was not merely contradictory, it still remains a fact that it did not have great, if any, bearing upon the real issue, which issue was: Did the original owners establish and acquiesce in a boundary line between the Kimball and Rydahl lands? These facts, as we have pointed out, are not even seriously disputed by the evidence. The legal effect of the evidence of the Oregon witness, therefore, would simply be an attack upon the credibility of the

respondent as a witness. If all that respondent said with regard to what some of the Kimball heirs stated to him at or immediately preceding the time he bought the land were entirely ignored, the findings and judgment should still be the same. As to the other parts of respondent's 6 testimony, he is either corroborated, or they are not disputed facts, so that whatever effect the statements of the Oregon witness might have on respondent's credibility, they could not affect the result reached by the trial court, which, in view of all the facts and circumstances and the law applicable thereto, we are convinced is clearly right.

What we have said also covers counsel's contention that the court erred in overruling the motion for a new trial upon the ground that respondent's counsel, after serving notice of the taking of the deposition of the Oregon witness, failed to do so, and further failed to inform appellant's counsel of such fact. For aught that is made to appear, counsel 7 for respondent may have had good reason for not taking the deposition. At all events, their conduct was not such as would authorize a court to grant a new trial upon the ground of misconduct for the reasons appearing in this record.

Counsel for appellant, however, insist that the court erred in decreeing that the appellant be required to "erect a substantial fence upon the old line as described in paragraph 9" of the findings of fact. By a reference to the issues and the evidence in support thereof, the matter referred to in the foregoing quotation was not before the court for adjudication. If it were conceded, therefore, that in an ordinary case to quiet title, like the one at bar, the court had the power to require a party to comply with such a condition, 8 yet in this case no such a question was presented, and hence could not be decided. We are of the opinion, therefore, that the court erred in requiring the appellant to erect a fence as provided in the decree. In view that this requires us to modify the decree with respect to a matter of substance, we are also of the opinion that each party should be required to pay one-half of the costs on appeal.

The judgment and decree of the district court is therefore in all things affirmed, except in the matter of requiring the appellant to erect a fence as in the decree provided; and, for the purpose of modifying the judgment and decree in that regard, the case is remanded to the district court, with directions to eliminate from said judgment and decree the following: "And erect a substantial fence upon the old line as described in paragraph 9." When said judgment and decree is so modified, it is affirmed as modified. It is further ordered that each party pay one-half of the costs on appeal.

STRAUP, C. J., and McCARTY, J., concur.

SMITH v. CLARK et al.

No. 2063. Decided January 7, 1910 (106 Pac. 653).

1. **PLEADING—COMPLAINT—JOINT DEMURRER.** Where a complaint, in an action against several defendants, stated a cause of action against some of them, it was good as against a joint demurrer by all. (Page 121.)
2. **FALSE IMPRISONMENT—CIVIL LIABILITY—ACTIONS—INSTRUCTIONS.** In an action for false imprisonment, consisting of the arrest of a party under a void warrant of a justice of the peace, an instruction that all persons parties to the issuing, procurement, or service of the warrant would be liable as trespassers for any damages caused thereby, and that all the proceedings were void from the beginning, was erroneous, as conveyng the idea that the person making the complaint in the justice court was liable as a trespasser. (Page 121.)
3. **FALSE IMPRISONMENT—CIVIL LIABILITY—ACTIONS—INSTRUCTIONS.** Such instruction was erroneous, where the person who made the complaint in the justice court was a party defendant, and the evidence failed to show that he took any part in the subsequent proceedings. (Page 122.)
4. **FALSE IMPRISONMENT—CIVIL LIABILITY.** A party making and verifying a complaint before a justice is not liable for false imprisonment of the person arrested on a warrant issued by the

justice, where he took no further part in the proceeding, though the complaint stated no offense. (Page 123-133.)

5. **FALSE IMPRISONMENT—CIVIL LIABILITY—NATURE AND ELEMENTS—“FALSE IMPRISONMENT.”** “False imprisonment” is the unlawful arrest and detention of the person of another, with or without a warrant or other process, or an unlawful restraint upon his person, or control over the freedom of his movements by force or threat; and every such force, restraint, or confinement is unlawful, where it is not authorized by law. (Page 126.)
6. **FALSE IMPRISONMENT—CIVIL LIABILITY—ACTIONS—PLEADING.**—In an action for false imprisonment, plaintiff must plead that the imprisonment was wrongful or unlawful, or the facts or circumstances showing the unlawfulness thereof. (Page 126.)
7. **FALSE IMPRISONMENT—CIVIL LIABILITY—ACTIONS—EVIDENCE.** Where, in an action for false imprisonment, the facts show that plaintiff was restrained or imprisoned by the defendant without a warrant or other process, or by threats or force, or by other facts and circumstances which naturally give rise to the inference or presumption that the restraint or imprisonment was wrongful or unlawful, he makes a prima facie case, and the burden is on defendant to show a legal justification for the imprisonment. (Page 127.)
8. **FALSE IMPRISONMENT—CIVIL LIABILITY—ACTIONS—EVIDENCE.** In an action for false imprisonment, where plaintiff, by his own evidence, shows that he was imprisoned as the result of a judicial proceeding and by a warrant, or other legal process issued thereon, he is required, in order to make a prima facie case to show something more than detention or imprisonment. (Page 127.)
9. **TRIAL—INSTRUCTIONS—SUFFICIENCY.** Instructions should not be mere abstract statements of law. (Page 127.)
10. **FALSE IMPRISONMENT—CIVIL LIABILITY—PERSONS LIABLE.** The rule that every imprisonment of a man is prima facie a trespass, and in an action to recover therefor, if the imprisonment is proved or admitted, the burden of justifying it is on the defendant, does not apply to the person who made the complaint against the party imprisoned before the justice, who issued the warrant and caused his arrest, where he took no other part in the proceedings. (Page 128.)
11. **MALICIOUS PROSECUTION—CIVIL LIABILITY—WANT OF PROBABLE CAUSE—RESULT OF PROSECUTION.** Whether or not the discharge by a magistrate of one accused of crime is evidence of want of probable cause for his prosecution depends on the proceeding had before the magistrate; and where he was discharged without a hearing, and there were no circumstances which in themselves indicated a want of probable cause, this discharge, although proof of the

unsuccessful termination of the prosecution, was no proof in a civil action for malicious prosecution of want of probable cause. (Page 131.)

12. **MALICIOUS PROSECUTION—CIVIL LIABILITY—ACTIONS—EVIDENCE.** In an action for malicious prosecution of plaintiff on a charge of larceny of brick, the record in a justice court of an action of replevin between the same parties, holding that the defendant in the malicious prosecution action was the owner of the brick, and entitled to possession of them at the time they were taken by the plaintiff, was admissible, as tending to show probable cause for the prosecution. (Page 131.)

APPEAL from District Court, Fourth District; *Hon. J. E. Booth*, Judge.

Action by A. O. Smith, Jr., against H. G. Clark and others.

Judgment for plaintiff. Defendant Barry appeals.

REVERSED AND REMANDED.

W. E. Rydalch for appellant.

J. H. McDonald for respondent.

STRAUP, C. J.

This is an action for false imprisonment and malicious prosecution, based upon the following transactions: The plaintiff and Barry had a controversy with respect to the ownership and the right of possession of some adobe brick. A Mr. Stewart, who made the brick from clay belonging to the plaintiff, had agreed to pay plaintiff a royalty. Barry had acquired an interest in the brick, and had taken, without objection, a sufficient number of them to build a house. When he attempted to take several more loads to build an outhouse a dispute arose between him and the plaintiff as to the payment of the royalty. The plaintiff contended that the full amount of the royalty had not been paid, and forbade Barry taking more brick until the royalty was paid.

Barry, on the other hand, contended that the royalty had been paid in full, and that the brick which he was about to take belonged to him. The brick were in a public street. The plaintiff, claiming the right to hold them until the royalty was paid, ordered Barry away, swore at him, and threatened to have him arrested if he took them without paying the royalty. Barry thereupon withdrew and departed. Thereafter he went before a justice of the peace, and told him the facts of the controversy. The justice drew a complaint which was entitled in the justice court for Myton Precinct, County of Wasatch, State of Utah, before H. G. Clark, justice of the peace, and was styled "The State of Utah, Plaintiff, v. A. O. Smith, Jr.," and another, as defendants, "Complaint for unlawfully holding the property of another." The unlawful acts alleged were that the defendants "on or about the 14th day of November, 1907, did unlawfully retain and hold, and have held ever since, one quantity of adobe brick, the property of said D. Barry. The said adobe brick being in the public highway, to-wit," a street in Myton. The complaint was signed and verified by Barry, the appellant, and was filed before the justice. The justice issued a warrant of arrest, and delivered it for service to the defendant, Ira Calvert, a special officer appointed by the justice. The warrant recited that a complaint on oath had been made by Barry before the justice "that the offense of detaining property of D. Barry has been committed, and accusing A. O. Smith, Jr.," and another, and commanded the officer to arrest the accused and bring them before the justice. By virtue of it the plaintiff was arrested by such officer and brought before the justice. He filed a motion for a change of venue. The order granting the change recites that the "parties concerned could not agree as to the nearest justice, so this court ordered the case to come up before Justice F. L. Clegg, of Heber Precinct, Heber (Wasatch County) Utah. Court appointed W. H. Murdock as constable to take charge of prisoners, and take them with due dispatch to above named justice." The plaintiff was taken before the justice at Heber,

who dismissed the case and discharged the plaintiff. Upon plaintiff's return to Myton, and in the nighttime, he removed the brick from the street, and placed them on a lot claimed to be owned by him. Barry, learning of such fact, again went before the justice of the peace, Clark, and told him of it. He and the justice viewed the premises to ascertain whether the brick had been removed from the street and placed on the lot. Finding such to be the fact, the justice drew another complaint, charging the plaintiff with grand larceny. That complaint is not in the record. It, however, is conceded by both parties that the offense of grand larceny was sufficiently charged in the complaint, and that it was signed by Barry, and was filed before the justice, and that it was induced by plaintiff's acts in removing the brick from the street, and withholding them from Barry. A warrant of arrest was issued by the justice upon that complaint. The plaintiff was arrested on such charge, and again brought before the justice. On the day the case was set for hearing the county attorney failed to appear. The case was therefore dismissed by the justice, and the plaintiff discharged without a hearing.

The complaint in this action is on two counts: The first, for false imprisonment, based on the first proceedings before the justice, wherein the plaintiff was charged with, and arrested for, "unlawfully holding and detaining" property belonging to Barry; the second, for malicious prosecution, based on the second proceedings, wherein the plaintiff was charged with, and arrested for, grand larceny. The action was brought against H. G. Clark, the justice of the peace, H. Calvert, and E. M. Jones, sureties on his official bond, Ira Calvert, the officer who served the warrants, and D. Barry, who made the complaints before the justice. The case was tried to the court and a jury. A verdict was rendered against Clark, the justice, for one hundred dollars on the first cause of action, and one hundred dollars on the second cause of action, and against the defendant Barry for one hundred and fifty dollars on the first cause of action, and for

one hundred and fifty dollars on the second cause of action. Judgment was entered accordingly. From that judgment the defendant Barry alone has prosecuted this appeal.

He contends, first, that no sufficient facts are stated in either count to constitute a cause of action, and that the court therefore erred in overruling the demurrer to the complaint. The demurrer filed was a joint demurrer of all the defendants. A good cause of action was stated in the complaint on the first count, against the defendants Clark and Ira Calvert. Though the facts stated in the first count were not sufficient to constitute a cause of action against the appellant, the demurrer, being a joint demurrer, 1 was nevertheless properly overruled as to all of the defendants joining therein. Sufficient facts are stated in the second count to constitute a cause of action against the appellant. This assignment is therefore overruled.

It is further contended that the court erred in charging the jury to the effect that the complaint which was filed before the justice of the peace in the first proceedings, and referred to in the first cause of action, "was not sufficient in law to authorize the issuance of a warrant, nor was the warrant on its face sufficient to protect any person serving the same, so that all persons parties to the issuing, procurement, or service of the said warrant would be liable as trespassers for any damages caused thereby, and all the proceedings relating to this cause [had before the justice, and upon which the first cause of action was based] were void in law from the beginning." We think the charge, as applied to the appellant, was too general and indefinite. It undoubtedly gave the jury the impression that because the appel- 2 lant made and verified the complaint, in the justice's court, which the jury were told "was not sufficient in law to authorize the issuance of a warrant," and because they were further told "that all the proceedings relating" thereto "were void in law from the beginning," he was a trespasser and rendered himself liable for false imprisonment. The complaint filed before the justice, of course, was insufficient. It

stated no public or legal offense known to the law. It only charged that the plaintiff had unlawfully detained and withheld property belonging to the appellant, but not that the plaintiff had committed any crime. The complaint did not authorize the issuance of a warrant. The warrant itself was void upon its face. It commanded the arrest of the plaintiff for "the offense of detaining property," an alleged offense unknown to the law. The justice issuing the warrant, the officer, or any other person arresting the plaintiff thereunder, and all other persons participating in, or directing, the issuance and execution of the warrant were trespassers, and liable for false imprisonment. If the charge had restricted the trespass to the acts of, or the participation in, the issuance and execution of the warrant, or the arrest or imprisonment of the plaintiff, it would not abstractly have been objectionable. It, however, would still have been open to the objection that it was not applicable to the evidence, so far as it was intended to apply to the appellant, for there is no evidence to show that he participated in, or directed, the issuance or the execution of the warrant, 3 or that he participated in, or directed, the arrest or imprisonment of the plaintiff, beyond the mere making of the complaint. By that instruction, however, it was intended to charge a liability for false imprisonment on the part of the appellant because he made and verified a complaint which did not charge a public offense, and which did not authorize the issuance of a warrant, and because he instigated proceedings which "were void in law from the beginning." Counsel for both appellant and respondent have so treated the charge. The latter, in his brief, says that "the appellant swearing to the complaint was sufficient" to make him liable "in the first cause of action." We fear the jury likewise so understood it. At least we think it fairly open to such a construction.

The question whether a complainant, who made a complaint or affidavit before a justice of the peace or commissioner which was insufficient to charge a public or legal offense,

or to confer jurisdiction on the court for the issuance of a warrant, is liable in an action for damages for false imprisonment has given rise to much controversy, and is one upon which the authorities are not in harmony. In the cases of *Forbes v. Hicks*, 27 Neb. 111, 42 N. W. 898, and *Fkumuto v. Marsh*, 130 Cal. 66, 63 Pac. 303, 509, 80 Am. St. Rep. 73, it was held that the complainant is liable in such case. But we are of the opinion that the decided weight of authority is against such a holding. The doctrine is stated in 12 A. & E. Ency. Law, 755, to be that, where a person merely states facts to a judicial officer upon which a warrant issues, the former will not be liable for false imprisonment, though the facts stated constitute no crime, that a mere entering of a complaint is not sufficient to render the com- 4 plainant so liable, even though the magistrate had no jurisdiction to issue the warrant, and that in order to render the complainant under such circumstances liable in damages for false imprisonment there should be some participation in the issuance and execution of the warrant, in addition to the mere making of the affidavit or complaint. In the case of *West v. Smallwood*, 3 M. & W. 418, Lord Abinger said:

"Where a magistrate has a general jurisdiction over the subject-matter, and a party comes before him and prefers a complaint, upon which the magistrate makes a mistake in thinking it a case within his authority, and grants a warrant which is not justifiable in point of law, the party complaining is not liable as a trespasser, but the only remedy against him is by an action upon the case, if he has acted maliciously."

In the case of *Gifford v. Wiggins*, 50 Minn. 401, 52 N. W. 857, 36 Am. St. Rep. 648, the court said:

"It seems to be settled by an almost unbroken line of authorities that if a person merely lays a criminal complaint before a magistrate in a matter over which the magistrate has a general jurisdiction, and the magistrate issues a warrant upon which the person charged is arrested, the party laying the complaint is not liable for an assault and false imprisonment, although the particular case may be one in which the magistrate had no jurisdiction. . . . This rule has been frequently applied where the facts stated in the complaint did not constitute a public offense, and it can make no difference in principle whether this

is because the facts stated do not bring the case within a valid statute, or because the statute under which the proceedings were instituted is invalid. In either case, the acts charged constitute no offense, because there is no law making them such."

In the case of *Murphy v. Walters*, 34 Mich. 180, it was said: "It seems to be considered that in criminal proceedings a person who simply lays facts before a magistrate, and leaves all further action to the unbiased and unsolicited conduct of the latter, is not liable in trespass for false imprisonment, unless he takes some part in furthering the arrest, or urging the detention." Again, in the case of *Brown v. Chapman*, 60 E. C. L. 363, Wilde, C. J., said: "If an individual prefers a complaint to a magistrate, and procures a warrant to be granted, upon which the accused is taken into custody, the complainant is not liable in trespass for that imprisonment; and that even although the magistrate had no jurisdiction." To the same effect are, also, *Tillman v. Beard*, 121 Mich. 475, 80 N. W. 248, 46 L. R. A. 215; *Fenelon v. Butts*, 49 Wis. 342, 5 N. W. 784; 19 Cyc. 329; *Gelzenleuchter v. Niemeyer*, 64 Wis. 316, 25 N. W. 442, 54 Am. Rep. 616; *Langford v. Boston & Albany R. R.*, 144 Mass. 431, 11 N. E. 697; *Booth v. Kurrus*, 55 N. J. Law 370, 26 Atl. 1013.

From the cases, and upon principle, we think it is clear that a party who merely originates a suit by stating the case to, or signing a complaint before, a court of justice is not guilty of trespass, though the proceeding should be erroneous or without jurisdiction. Such an application is only a plea to the magistrate to exercise his jurisdiction, leaving him to the exercise of that jurisdiction upon his own discretion, and cannot be considered as constituting the magistrate the agent of the complainant or suitor, or as calling upon him to act ministerially upon the authority of such complainant or suitor. "This rule of exemption," says the court, in the case of *Marks v. Townsend*, 97 N. Y. 590, "is founded in public policy, and is applicable alike to civil and criminal remedies and proceedings, that parties may be induced freely to resort

to the courts and judicial officers for the enforcement of their rights and the remedy of their grievances without the risk of undue punishment for their own ignorance of the law, or for the errors of courts and judicial officers." Of course if the complaint is malicious, and without probable cause, the complainant may be answerable in another form of action. And if the complainant is guilty of officious interference, or of a participation in the issuance and execution of the warrant beyond the mere making of the complaint, he may also be answerable in an action for false imprisonment. But no such interference or participation upon the part of the appellant is shown. All that is shown is that he stated the facts of the controversy between him and the plaintiff to the justice, who thereupon drew the complaint, which was signed and verified by the appellant. That was not enough to make him liable for false imprisonment, though the complaint did not state a public offense, and though the justice was not authorized to issue a warrant thereon. We think the charge misleading, and, in view of the evidence, stated to the jury, in so far as it was made applicable to the appellant, a wrong principle of law.

Complaint is also made of the following charge: "Every imprisonment of a man is prima facie a trespass, and in an action to recover damages therefor, if the imprisonment is proved or admitted, the burden of justifying it is on the defendants participating therein." This identical statement of the law is made in the case of *Bassett v. Porter*, 10 Cush. (Mass.) 418, and is approved in *Jackson v. Knowlton*, 173 Mass. 94, 53 N. E. 134. In *Black v. Marsh*, 31 Ind. App. 53, 67 N. E. 201, it was held that no error was committed by an instruction to the jury, "to the effect that the fact that the appellee was imprisoned was sufficient to raise the presumption that such imprisonment was illegal, and that the burden of establishing the contrary was upon the defendants." To the same effect are *People v. McGrew*, 77 Cal. 570, 20 Pac. 92; *Ah Fong v. Stearnes*, 79 Cal. 30, 21 Pac. 381. In *Zimmerman v. Knox*, 34 Kan. 245, 8 Pac.

104, it was said that, "it having been shown that the plaintiff was arrested and imprisoned at the instance of the defendant without process, and for the purpose of collecting a debt, the burden of proof was shifted, and rested upon the defendant to show a justification or mitigation of the imprisonment." So, too, in *Franklin v. Amerson*, 118 Ga. 860, 45 S. E. 698. In *Barker v. Anderson*, 81 Mich. 508, 45 N. W. 1108, the court said that: "As a general proposition, it must be admitted that it is only necessary for the plaintiff in an action of this kind, to show that he has been imprisoned or restrained of his liberty. The presumption then arises that he was unlawfully imprisoned, and it is for the person who has committed the trespass to show that it was legally justified"—but also held that if the plaintiff shows that the imprisonment resulted from the issuance of process upon judicial proceedings, the burden was upon him to show their invalidity. To the same effect is the case of *Snow v. Weeks*, 75 Me. 105. False imprisonment is the unlawful arrest and detention of the person of another, with or 5 without a warrant or other process. It consists in an unlawful restraint upon a man's person, or control over the freedom of his movements, by force or threats; and every such restraint or confinement is unlawful where it is not authorized by law. The actual detention of the person, and the unlawfulness thereof, constitute the trespass; the gravamen being the unlawfulness of the imprisonment or the detention.

According to the weight of authority a plaintiff in an action for false imprisonment is required to aver that the detention or imprisonment was wrongful or unlaw- 6 ful, or the facts and circumstances showing the unlawfulness thereof. (8 Enc. Pl. and Pr. 846.) In *Ah. Fong v. Stearnes*, *supra*, a statement, *obiter dictum*, is made that such allegations are not essential. But in *Going v. Dinwiddie*, 86 Cal. 633, 25 Pac. 129, the same court clearly announced a contrary doctrine. In the cases of *Gallimore v. Ammerman*, 39 Ind. 323, and *Carey v. Sheets*, 67 Ind. 375, often

cited as holding that such allegations need not be made, the effect of the holdings are that it was not necessary to characterize the alleged acts as wrongful or unlawful, or that the detention or imprisonment was without competent authority, when the facts as alleged, on being 7 proved, entitled the plaintiff, prima facie, to recover.

In both those cases the facts of the detention or restraint, which were alleged in detail, prima facie, showed a wrongful and unlawful restraint or detention. Since a plaintiff is required to allege something more than a mere imprisonment to constitute a good cause of action for false imprisonment, we think it logically follows that to make a prima facie case plaintiff is required to prove something more than a mere imprisonment by the defendant. When by proof of facts or circumstances tending to show that the plaintiff was restrained or detained or imprisoned by the defendant, without a warrant, or other process, or by threats or force, or other facts or circumstances which naturally give rise to the inference or presumption that the restraint or imprisonment was wrongful or unlawful, he undoubtedly has made a prima facie case. The duty of proceeding to show a legal jurisdiction for such restraint, detention, or imprisonment then rests upon the defendant. When, however, the plaintiff by his own evidence shows that he was detained or im- 8 prisoned as the result of judicial proceedings, and by the issuance and execution of a warrant, or other legal process issued thereon, he is required, in order to make a prima facie case of false imprisonment, to show something more than a mere detention or imprisonment. In the first instance the natural inference or presumption arises that the restraint or imprisonment was unlawful. In the other no such presumption arises from the mere arrest or imprisonment. In some cases it is proper enough to charge that the imprisonment is prima facie a trespass. But it is not proper to give it in all cases. Instructions should not 9 be mere abstract statements of the law. They should be based upon the evidence and the pleadings in the cause.

Upon the evidence adduced in the case, and as against the justice and the officer, the court very properly could have charged the jury that the arrest and imprisonment of the plaintiff was not only *prima facie* a trespass, but was false and unlawful. For the one issued a warrant, and commanded the arrest of the plaintiff, on alleged acts which did not constitute any offense known to the law; the other served the warrant void upon its face, and by virtue 10 of it, arrested and imprisoned the plaintiff. But the charge was improper as against the appellant because there was no evidence tending to show that he participated in the issuance or execution of the warrant, or in the arrest or imprisonment, beyond the mere making of the complaint. As against him the charge was liable to impress the jury with the belief that there was evidence tending to prove his participation in the issuance or execution of the warrant, or the arrest or imprisonment, when such was not the case, and for that reason was improper. (11 Enc. Pl. and Pr. 175.)

The appellant requested the court to charge that the dismissal of the criminal action in the justice's court for grand larceny, and the discharge of the plaintiff, was not evidence, in the second cause of action for malicious prosecution, to show a want of probable cause for the prosecution. The court refused to so charge, and gave no charge as to the inference to be drawn from such dismissal and discharge. We again approach a question upon which the authorities are divided. In a recent case, *Davis v. McMillan*, 142 Mich. 391, 105 N. W. 862, 3 L. R. A. 928, 13 Am. St. Rep. 585, the Supreme Court of Michigan held that: "A discharge of one accused of crime, not brought about by the procurement of the complaining witness, nor attended by circumstances involving his conduct, which of themselves indicate a want of probable cause, is no evidence of a want of probable cause in an action against such witness for malicious prosecution." Cases supporting such holding, and those conflicting therewith, are there cited and reviewed. In 26 Cyc. 38, the rule is stated that: "If the result of the preliminary examination

is the discharge of the accused by the magistrate, this has been held to be prima facie, but is not conclusive, evidence of the want of probable cause; but the later and better opinion is that more than a mere dismissal by the magistrate must be proved, and that standing alone it is no evidence of want of probable cause." In 19 A. and E. Ency. Law, 664, it is said: "The weight of authority is believed to favor the rule that the discharge of the plaintiff in malicious prosecution by the examining magistrate is prima facie evidence of want of probable cause for the proceedings complained of," but that "it has been held that lack of probable cause is not shown by the abandonment of the prosecution by the prosecutor, by the dismissal of the charge by the prosecutor, by the voluntary discontinuance of the prosecution, or by dismissal for want of prosecution." See, also, 3 Elliott on Evidence, secs. 324, 2475.

The question is made the subject of extensive notes to the cases of *Bekkeland v. Lyons*, 64 L. R. A. 481; *Davis v. McMillan*, 3 L. R. A. (N. S.) 929; *Ross v. Hixon*, 26 Am. S. Rep. 154. In the foregoing are cited many of the cases bearing on the question. From them may be deduced three rules: The first, that a discharge by an examining magistrate, not attended by circumstances involving the conduct of the prosecutor which of themselves indicate a want of probable cause, is no evidence of want of probable cause in the action for malicious prosecution; the second, that any discharge by an examining magistrate is prima facie evidence that there was a want of probable cause for the prosecution; the third, depending upon the proceedings had before the magistrate which resulted in the discharge. If the discharge resulted from a mere abandonment or voluntary dismissal or discontinuance of the prosecution, and from no hearing and no examination as to the charged offense, then such a discharge or dismissal, standing alone, is no evidence of a want of probable cause in the action for malicious prosecution. If, on the other hand, the discharge resulted from a

hearing of the charged offense—that is, if on the evidence adduced by the prosecutor, or the state, the accused was discharged because of a want of evidence to induce the magistrate to believe that there was probable cause, either that an offense had been committed, or that the accused had committed it—then the discharge or dismissal is *prima facie* evidence of a want of probable cause in the action for malicious prosecution. We believe that the third rule is founded upon the better reason and sounder principle. The rule is extended far enough when it makes the discharge or dismissal, resulting from a hearing or an examination of the offense charged, evidence of the want of probable cause in the civil action against the prosecutor for malicious prosecution. Though he is the complainant in, or the instigator of, the criminal action before the magistrate, nevertheless he is not a party litigant, and has no direction of, or control over, the action or the prosecuting officers, or the magistrate. But since the burden resting upon the plaintiff in the action for malicious prosecution to prove a want of probable cause for the prosecution involves the proof of a negative, and because of the principle of expediency so often applied to rules of evidence, there is ground for holding that the discharge or dismissal resulting from a want of evidence adduced by the prosecutor, or the state, is *prima facie* evidence of a want of probable cause for the prosecution. In such case the magistrate determined that there was no probable cause for believing the accused guilty. But we see no good reason for holding that a mere discharge or dismissal, standing alone, and resulting not from any examination or hearing of the charged offense, is evidence of the want of probable cause, for the magistrate in such case did not investigate nor determine whether there was or was not probable cause for believing that an offense had been committed, or that the accused was guilty thereof. A finding of a want of probable cause is not necessarily inherent nor involved in such a discharge or dismissal. The discharge here was made without a hearing, and without any judicial investigation, and was unattended

by circumstances involving the conduct of the appellant which in themselves indicate a want of probable cause for the prosecution. We are therefore of the opinion that the mere dismissal of the criminal action and the discharge of the plaintiff was no evidence in the civil action to show a want of probable cause for the prosecution, and that upon the evidence adduced the appellant was entitled to such an instruction. Of course the evidence of the discharge and dismissal was competent, and properly received for the purpose of showing an unsuccessful termination of the criminal prosecution, but not for the purpose of showing a want of probable cause for the prosecution. 11

The appellant offered in evidence a record of a justice's court by which he sought to prove that in an action of replevin brought by him as plaintiff, and against the plaintiff as defendant, it was adjudged that the plaintiff (appellant here), at the time of the alleged controversy between them, was the owner and entitled to the possession 12 of the brick in question, that no appeal had been taken from such judgment, and that it became and was final. The evidence was excluded. We think it was admissible. In defense of the allegations that the appellant had without probable cause and with malice charged the plaintiff with a larceny of the brick, it was competent for him to show that the plaintiff was guilty of the charge, or the circumstances which indicated probable cause for believing him guilty thereof. An essential element of the crime charged was that the subject of the larceny was property belonging, not to the plaintiff, but to another. The ownership and right of possession of the brick, the subject of the larceny, was material, as bearing on the question of probable cause for believing the plaintiff guilty of a larcenous asportation of the brick. The proffered evidence showing an adjudication between the plaintiff and the defendant on the question of ownership and right of possession was competent on such questions in this action. Of course such evidence would not, in and of itself, be sufficient to show probable cause for believing that the plaintiff

had purloined the brick. That it had a bearing, however, upon a material question cannot well be doubted. The competency and admissibility of evidence, and its sufficiency to establish an essential ultimate fact, are, however, two quite different things. The plaintiff introduced evidence tending to show that he was the owner and entitled to the possession of the brick. That evidence was, of course, offered to show that the appellant had not probable cause for believing the plaintiff guilty of the charge of larceny. As tending to prove the contrary, it certainly was competent for the appellant to show that he, and not the plaintiff, was the owner, and entitled to the possession of the brick at the time of their controversy. The judgment rendered in the action between them, wherein such questions were adjudicated in favor of the appellant, and against the plaintiff, was not only competent, but conclusive, evidence on such questions. The parties to both actions were the same. It has been said that to warrant the use of a former adjudication as evidence in another action it is essential, not only that the parties be the same, but also that the subject-matter of the two actions be substantially the same (7 Enc. of Ev. 830), but that there is an identity of subject-matter, though the form of the action may be different, when the same evidence as to the matters in dispute will sustain both. (7 Enc. of Ev. 836.) It has also been said that the true test is not identity of subject-matter, but identity of issues. (23 Cyc. 1298-1300.) But as said by Mr. Black, in his work on Judgments (volume 2, sec. 614) the correct doctrine rests upon the fact that the particular proposition or point was actually litigated, and actually determined the verdict or the finding. That is, a former adjudication is evidence in a subsequent action between the same parties, or their privies, on all points and questions, raised and litigated in the subsequent action, which were actually litigated and directly determined in the former action, and upon which the former adjudication necessarily depended.

In 23 Cyc. 1321, it is said: "A judgment, in an action in which the title to a chattel was directly in issue and adjudicated, is conclusive on that point between the parties and their privies, without regard to the form or purpose of the action." And in the same volume (page 1341) it is said that a judgment in replevin "ordinarily determines nothing more than the right of the successful party to the immediate possession of the property in question, and does not settle anything as to the title or ownership, unless that particular matter is the issue on which the decision actually turns." On the face of the judgment and pleadings in the replevin action offered in evidence it affirmatively appears that both the ownership and right of possession of the property were actually litigated and directly determined, and that the determination of both such questions was necessary to the judgment. The right of possession was there made dependent upon the question of ownership. When in a subsequent action, though in a different form, such questions recur between the same parties, and are again raised and litigated, such former adjudication is, upon such questions, not only competent, but binding, evidence. (*Baxter v. Myers*, 85 Iowa 328, 52 N. W. 234, 39 Am. St. Rep. 298.) We think the court erred in excluding the evidence.

The question of insufficiency of the evidence to sustain the verdict is also raised. There being no evidence to show that the appellant participated in the arrest or imprisonment of the plaintiff beyond the mere making of the complaint before the justice, or that he officiously, or otherwise, directed the issuance or execution of the warrant, we think, for the reasons heretofore given, that the verdict, rendered upon the first cause of action against the appellant, is not supported by sufficient evidence. We think there is sufficient evidence to support the verdict on the second cause of action. Whether the appellant, under all the circumstances, had probable cause for believing that the plaintiff had committed the offense of grand larceny was, upon the evidence adduced, a question for the jury. From the nature of the acts themselves upon

which the charge was actuated, and upon all the surrounding circumstances shown in evidence under which they were committed, of all of which the appellant was cognizant and had personal knowledge when he made the complaint, a jury may say that he had not probable cause for believing that the plaintiff was guilty of larceny, or of any other criminal offense.

Because of the erroneous rulings referred to, and for the reasons heretofore given, the judgment of the court below must be reversed, and the case remanded for a new trial, with costs to the appellant. Such is the order.

FRICK and McCARTY, JJ., concur.

MCCORNICK v. LEVY.

No. 2040. Decided January 7, 1910 (106 Pac. 660).

1. EVIDENCE — PAROL EVIDENCE — VARYING WRITTEN AGREEMENT. When parties have deliberately put their contract in writing, and there is no uncertainty as to the extent of their respective rights and obligations thereunder, it cannot be varied by showing a prior or contemporaneous oral agreement in conflict with and at variance with the written instrument, and hence evidence of a contemporaneous oral agreement not embraced in the terms of a note and mortgage was not admissible to show that they were to be paid in merchandise. (Page 136.)
2. MORTGAGES—EXECUTION—FRAUD—EVIDENCE. Evidence held to show that defendant executed a mortgage and note to plaintiff's bank without receiving any consideration under the misapprehension that she was securing a debt of her son's company to the bank, while in fact she was securing the debt of others to the bank; she being induced to do so by a fraudulent scheme of her son and plaintiff. (Page 146.)

APPEAL from District Court, Third District; *Hon. C. W. Morse*, Judge.

Action by W. S. McCornick against Marie Levy.

Judgment for plaintiff. Defendant appeals.

REVERSED AND REMANDED FOR NEW TRIAL.

Geo. W. Bartch and *O. A. Murdock* for appellant.

Henderson, Pierce, Critchlow & Barrette for respondent.

McCARTY, J.

This is an action for the foreclosure of a mortgage. From a judgment entered in favor of plaintiff, defendant appeals.

The complaint recites that the mortgage was executed by defendant to secure the payment of her promissory note of even date therewith for the sum of \$8421.28, and contains a prayer for a foreclosure and sale of the mortgaged property. Defendant in her amended answer admits the execution of the note and mortgage, but seeks to avoid their effect by alleging, among other things, that there was a contemporaneous and collateral oral agreement between plaintiff and defendant, in which plaintiff promised to accept in payment of the note and mortgage certain goods and merchandise as the same should be manufactured by the Sam Levy Cigar Company, a corporation engaged in the manufacture and sale of cigars, and that said goods and merchandise were tendered to plaintiff as the same were manufactured by the cigar company mentioned, and that plaintiff refused to accept the same, and that he thereby violated the terms of the oral agreement referred to and rendered the Sam Levy Cigar Company, for whose benefit, it is claimed, the note and mortgage were given, financially unable to pay either the principal or interest of the note and mortgage.

Much evidence was introduced on the issue tendered by these allegations of the answer. The court, in its sixth finding of fact, among other things, found "that the said note and mortgage were executed and delivered by defendant to plaintiff and were received by plaintiff in good faith and

without any agreement or contract expressed or implied upon the part of plaintiff other than is fully represented in the terms of said note and mortgage." Counsel for defendant contend that this finding of fact is wholly unsupported by the evidence, and is therefore erroneous. Notwithstanding the fact that they have devoted much space in their printed brief to the discussion of the questions presented by this assignment of error, we are of the opinion that the question of whether the allegations of the answer respecting the contemporaneous and collateral oral agreement were or were not sustained by the evidence is unimportant. The rule is elementary that, when parties have deliberately put their contract in writing, and there is no uncertainty as to the extent of their respective rights and obligations under such 1 contract, it cannot be overturned nor varied by showing a prior or contemporaneous oral agreement which is in conflict with and at variance with the written instrument. This rule has been so often announced by text-writers, and so closely adhered to and universally followed by the courts, that it would seem to be a work of supererogation on our part to cite authorities in support of it. We think that this defense, presented, as it is, in the amended answer, is unavailing for any purpose, and a finding thereon by the court was unnecessary. The answer, which contains nearly twenty-eight pages of printed matter, is somewhat vague and uncertain as to the other defense which defendant has endeavored to set up. In the absence of a special demurrer or motion to make the answer definite and certain, we have decided to treat it, for the purposes of this appeal, as the parties themselves have treated it, namely, as charging fraud and fraudulent representations; and we are of the opinion that it also in effect alleges want of consideration.

The facts and circumstances leading up to and surrounding the execution of the note and mortgage, as disclosed by the record, are about as follows: On or about July 1, 1905, the Sam Levy Cigar Company, a corporation engaged in the manufacture and sale of cigars in Salt Lake City, Utah,

and which we shall hereinafter, for the sake of brevity, refer to and designate as the "cigar company," was indebted to plaintiff, who was and is doing a general banking business under the name of McCornick & Co., Bankers, in the sum of about \$2500 on an overdraft which it had obtained at the bank. The cigar company, which, the evidence shows, was insolvent, also had other creditors, some of whom were in the East. W. S. McCornick, the plaintiff, was and is the sole owner and the general manager of the bank. When he was absent, his son Henry McCornick took his place as manager. The bank demanded payment of the overdraft, and J. R. Levy, one of the defendant's sons and general manager of the cigar company, called at the bank in response to the demand and had a conversation with Henry McCornick, plaintiff being out of the city at the time, about the overdraft. J. R. Levy testified—and his testimony on this point is not contradicted—that he explained to Henry McCornick that, "If the bank closed down on them, they would have to quit entirely, . . . and the company would lose all it had, and nobody would get any money . . . because the cigar company had practically no assets;" that Henry McCornick then asked him if the cigar company had more money whether it "could pull through," and he (Levy) answered that he thought it could; that it was there arranged between them that the bank should advance \$2500, and that he (Levy) should take the money, go East and buy all the goods he could on credit for the cigar company, and pay as little down on the purchase price as the Eastern merchants would accept and ship the goods, and, on his return, sell the goods for cash as fast as possible and deposit the proceeds in plaintiff's bank; that, in pursuance of this arrangement, he (Levy) went East with \$2500 and purchased all the goods in the name of the cigar company he could get on credit, paying as little money thereon as the merchants with whom he did the business would accept; that the goods were consigned to the cigar company and received by it in Salt Lake City, and the greater portion thereof, within the next ensuing three

months, were sold by him (Levy) "for cash and at reduced prices, sacrifice prices," and the money deposited in plaintiff's bank to the credit of the cigar company; that the cigar company was not allowed to draw any money out of the bank to pay any of its Eastern creditors; that the cigar company issued checks against the account, but they were not honored by the bank. At the time it was arranged for Levy to go East and purchase goods, a telegram was prepared by him and Henry McCornick and sent to Mrs. Levy, defendant, who was in New York, asking her to guarantee the payment of the \$2500 advanced to J. R. Levy to buy goods. Mrs. Levy, a few months prior thereto, had lost her husband, and, under the advice of her physicians, had gone to New York for the benefit of her health, which, because of her bereavement, had become very much impaired. The reply she made to the telegram is not in the record. We are therefore not advised what, if any, promise of guaranty was made by her.

Henry McCornick was called as a witness and interrogated by counsel for plaintiff concerning the transaction involving the \$2500 advanced by the bank, and the terms and conditions, if any, upon which it was understood between him and Levy that the goods should be purchased in the East by Levy, and testified as follows: "Q. I want to be very brief about it. State whether or not it is a fact that you gave or loaned to Joe Levy \$2500 for the purpose of going East to buy goods, instructing him to pay as little as possible, and get the goods back here leaving as much as possible to be due to the Eastern people from whom he bought.

A. My recollection of the fact was, I think the account standing, \$2500, \$2700 overdrawn. Q. That is the Sam Levy Cigar Company— A. The Sam Levy Cigar Company had been trying for some time to get the matter straightened up, one way or the other. He came into the bank one morning and stated he needed \$2500, or some such amount as that, but he wanted to buy more stock. Q. Now, did you arrange or agree with him, or instruct him in any manner, as to how he should buy goods, what he should do with the

\$2500? A. I don't remember. He said he intended to buy goods. I wasn't sure at the time whether he wanted to use this money to buy goods. Q. You understand what I am getting at, whether there was any agreement of any kind between you, is so, state what it was, as to what should be done with the \$2500, how he should buy goods, bring them on here, with only a small amount paid on them? A. Might have been something brought up with regards to the amount he would have to pay. Of course, I don't remember that."

It will be observed that Henry McCornick, notwithstanding counsel repeatedly called his attention to the alleged understanding between him and Levy respecting the terms and conditions upon which goods should be purchased in the East with the \$2500, as testified to by Levy, did not deny there was such an understanding. The effect of his testimony on this point is rather a corroboration than a contradiction of Levy's testimony. Further, we think the subsequent transactions had with reference to the goods, to which transactions plaintiff was a party, also tend to corroborate the evidence of Levy. When the goods arrived from the East, as many of them as could be disposed of were sold by Levy at reduced prices, and the money deposited in plaintiff's bank. Plaintiff did not permit any of this money to be used to pay the debts incurred by the cigar company in the purchase of the goods, and when these debts commenced falling due plaintiff and J. R. Levy, in order to put the goods beyond the reach of the creditors of the company, entered into an arrangement by which the goods were sold by Levy to an ostensible innocent purchaser, who took possession of them and continued the business in his own name, the proceeds of which, less running expenses, he turned over to plaintiff. The transaction last referred to we shall hereafter refer to more in detail.

While in some of the subsequent transactions leading up to and culminating in the execution of the note and mortgage in issue a claim was made that Mrs. Levy could be held on her alleged guaranty, and while there are some expres-

sions in plaintiff's brief indicating a similar view, yet plaintiff's case was not predicated on the theory that Mrs. Levy had guaranteed the payment of the \$2500 mentioned; nor is it contended that such guaranty was a consideration for the note and mortgage; nor is there anything legally claimed against the defendant on that account. A further answer to that claim is that, since the undisputed evidence tends to show that the \$2500 was advanced by the bank to enable J. R. Levy to defraud Eastern merchants out of their goods for the mutual benefit of the plaintiff and the cigar company, the defendant was neither legally nor morally bound by the alleged guaranty. This was practically conceded by counsel for plaintiff during the progress of the trial, and in referring to this alleged transaction between Henry McCornick and Levy, as pleaded in the answer, they very properly characterize it as "a fraudulent and immoral transaction, fraudulent as to the creditors and certainly immoral." But counsel insist that this allegation of fraud is not supported by evidence. When the debts of the cigar company incurred in the purchase of the goods began to fall due, and payment thereof was being demanded, Levy went to plaintiff and informed him that if these bills were not paid the creditors would bring suit against the cigar company and take the goods. There is some conflict in the evidence as to what was said by the parties on that occasion. It does appear, however, that it was there decided that a sale of the goods should be made to one John Bass, an employee of the cigar company, and that sale of the goods was soon thereafter made to Bass. The goods were delivered to him in installments; the cigar company taking his note for the amount of each installment as the goods were delivered. The value of the goods thus sold and turned over to Bass was from \$9500 to \$10,000. When Bass got possession of them, he in turn gave plaintiff a chattel mortgage on them for \$6000 to secure the payments of the notes which he had given to the cigar company in payment of the goods, which notes had been dis-

counted by the bank and the proceeds thereof placed to the credit of the cigar company's account with the bank.

There is some controversy as to whether these transactions between Levy, Bass, and the bank were had on the advice of plaintiff and in pursuance of a plan outlined by him, or at the request of J. R. Levy. We think, however, it is unimportant which of the two conceived the idea and suggested the plan by which the goods were sold and turned over to Bass. The record shows that each of them fully understood all the facts and circumstances under which the sale was made to Bass and expected to be mutually benefited thereby. The chattel mortgage executed by Bass to plaintiff, so far as material here, recites as follows: "For the purpose of obtaining the above loan I (Bass) represent that I am lawfully possessed of the said property herein described, and that the same is free from all incumbrances and liens whatsoever." Attached to the mortgage is the affidavit of the mortgagor and mortgagee, which reads as follows: "John Bass, mortgagor, and W. S. McCornick (plaintiff) mortgagee, being first duly sworn on their respective oaths, depose and say, each for himself, as follows: That he is a party to the within chattel mortgage, and that the same is made in good faith to secure the amount of indebtedness named therein and without any design to hinder or delay or defraud the creditors of said mortgagor." This affidavit was sworn to November 7, 1905. Counsel for plaintiff contend that, "as between the cigar company and Bass, the sale of the goods was a mere colorable one," but, they insist, that plaintiff, in the part he took in the transaction with Levy, on the one hand, and Bass, on the other, acted in good faith. Let this be as it may, the fact remains, however, as shown by the record, that plaintiff not only knew all the facts and circumstances leading up to and surrounding the sale of the goods to Bass, but was a material and necessary factor in the transaction, and that, without his assistance, the sale would never have taken place. For the purposes of this appeal we will assume that, as to this particular transaction, plaintiff not only acted in perfect

good faith with Bass, but with the cigar company also. Plaintiff's counsel, in their brief, say, and their statement of the facts on this point is fully supported by the record: "The (Bass) notes, . . . upon being discounted, went to the credit of the cigar company and amounted upon their face to sufficient to liquidate the indebtedness of the cigar company. In fact, in the aggregate, they amounted to more, and the cigar company withdrew by check from its account the overplus, not desiring to have its account show any funds in the bank to its credit. It appears from the testimony that the total amount of the notes of Bass so executed between October 23d and November 25th, and for which the cigar company got credit, was \$7205.65. It further appears that this overpaid the amount of the indebtedness of the cigar company, for \$1036 was drawn from this account by the cigar company and used in some manner. . . . It appears that on November 28, 1905, the cigar company had a credit balance of \$53.87." Therefore, according to plaintiff's own contention, the debt of the cigar company to the bank was fully paid November 28, 1905, and, instead of the cigar company being indebted to the bank, the bank was owing the cigar company. In fact, this is the only conclusion consistent with plaintiff's claim that he acted in good faith in his dealings with Bass and the cigar company which is deducible from the facts in the case. In the meantime the creditors of the cigar company were sending in their bills and demanding payment, and, as stated by counsel for plaintiff in brief, "plaintiff and Joe Levy became alarmed lest the Eastern creditors should attach the goods in the hands of Bass and make trouble for him (Levy)."

It necessarily follows, from the facts and circumstances which we have briefly reviewed, that the creditors, by attaching the goods, would have made trouble for plaintiff, by involving him in a lawsuit, all of which, the record shows, he fully appreciated and was anxious to avoid. Levy testified that he informed plaintiff that, if the goods were not paid for within a specified time, the cigar company would be

forced into bankruptcy, as it "had absolutely no funds" with which to pay its obligations; that plaintiff offered to turn the goods held by Bass over to him and advance sufficient money to settle with the creditors of the cigar company at twenty cents on the dollar, provided he (Levy) could induce the creditors to accept that amount in full payment of their claims and give plaintiff a chattel mortgage on the goods to secure the payment of the money so advanced, including the Bass indebtedness to the bank, and also get his mother, Mrs. Levy, the defendant herein, to give a mortgage on her home as additional security; that he refused to consider the proposition at all; that a few days thereafter plaintiff again submitted to him the following proposition: "He (plaintiff) says, 'You are a young man and can go into business for yourself. . . . There is a big stock of goods down there, and you can handle them and pay me back any time. . . . If you will settle with the creditors for me, I will advance you thirty cents on the dollar to pay their accounts in full, . . . providing you will get your mother to give you a note and mortgage on her home; . . . and I will give you, make you a present of, \$1500, if you will do this for me.'" Plaintiff testified that he made no such proposition to Levy, but that Levy came to him and stated that he wanted to get back the goods which had been turned over to Bass and sufficient money from the bank to settle with the creditors of the cigar company. We think it is unimportant from which side the proposition came. The evidence shows that, from this time on until the note and mortgage in issue were executed, both plaintiff and J. R. Levy worked to a common purpose, namely, to induce Mrs. Levy to mortgage her home and thereby enable Levy to get possession of the goods which had been turned over to Bass and to better secure the payment of the Bass indebtedness to the bank and relieve plaintiff from the legal complications which he had good reason to believe would arise should the creditors of the cigar company bring suit and attach the goods.

In January, 1906, plaintiff went to San Francisco, and during his absence Levy had some talk with Henry McCornick about obtaining money from the bank with which to effect a settlement with the Eastern creditors, and as a result each of them communicated with plaintiff in regard to the matter. On January 22, 1906, plaintiff wrote to Levy, and in the letter, among other things, he said: "Henry also telegraphed me that he understands the advance you asked for is to be considered as a gift, and that your mother is not to guarantee only our old account. Of course I cannot believe that he has this right, as I cannot understand why this amount needed to settle for the other creditors should be considered a gift. . . . Now, if we have to advance all this money I want your mother to give security on the lot you spoke of being under option of sale, and I have so written Henry. My advice is *that there is no question but your mother can be held under the guarantee that we have as well as the off chances in holding the goods under the mortgage.* However, I am anxious to have this matter settled on your account, as I am satisfied if not settled they will make it hard on you." (Italics ours.) It also appears from the evidence that Henry McCornick had in effect accused Levy of having obtained the \$2500 first mentioned under false pretenses. Levy, because of these covert threats that were made by the McCornicks and the inducements which we think the record fairly shows were held out to him by W. S. McCornick of pecuniary advantage to himself, importuned his mother to execute a mortgage on her home in favor of plaintiff. At first she positively refused to consider the proposition, but was finally overpersuaded by her son to do so, and on February 9, 1906, she called at the bank and signed the note and mortgage which had been prepared by the bank some ten days before. (January 30, 1906.) J. R. Levy testified that when Mrs. Levy signed the note and mortgage plaintiff handed him a check for \$1500, and stated: "Here is \$1500. I will make you a present of this"—which he (Levy) accepted. Mrs. Levy testified to the same thing.

Plaintiff in his testimony denies this and explains the transaction as follows: "I made a present in this way. I threw off \$1500. If he wants to call it a present, I guess it is about the same thing." Let that be as it may, the fact remains, as stated by counsel for plaintiff in their brief, that "the final arrangement was concluded and took the form of a transfer from John Bass to J. R. Levy of all the goods remaining in the hands of Bass." No further transactions were had in the name of the cigar company except the placing to its credit the money advanced by plaintiff to settle with its Eastern creditors, which was checked out by J. R. Levy for that purpose. In other words, J. R. Levy, with the assistance of plaintiff, got possession of the goods in his own name and went into business on his own account. The record shows that the Bass note and mortgage were not canceled by the bank until June 12, 1906, four months after the note and mortgage in issue were executed and delivered to plaintiff, showing that he claimed some interest in the goods for a considerable length of time after he obtained the note and mortgage from Mrs. Levy. Plaintiff also denied that he had sent Levy to his mother to induce her to give the mortgage in question. He admits, however, that he had some talk with J. R. Levy about getting his mother to give a mortgage. In fact, this is evident from his letter which he wrote to Levy from San Francisco hereinbefore referred to.

The undisputed evidence shows that Mrs. Levy was not a business woman, and had had but little, if any, experience in business matters; and that at the time she signed the note and mortgage she was under a nervous strain caused by the loss of her husband about a year before, and, according to her own testimony, which is not denied, she "was a physical wreck." And furthermore, the evidence, without conflict, shows that she was ignorant of the fraudulent transactions hereinbefore mentioned, commencing with the arrangement made and entered into between Henry McCornick and J. R. Levy, wherein the bank, according to the evidence of Levy,

which is not denied, advanced \$2500 with the express understanding that it should be used by Levy to defraud Eastern merchants out of their goods, and culminating in what we think the evidence shows to be an arrangement between the plaintiff and defendant's unnatural son to induce defendant to execute the note and mortgage to secure, not an indebtedness of the cigar company, which she believed she was securing, but to secure the indebtedness of others. It is alleged in the answer, and, as we have stated, we think it may be fairly inferred from the evidence, that at the time Mrs. Levy signed the note and mortgage she believed she was securing a debt owing by the cigar company to the bank. In her testimony she says, referring to the several transactions between J. R. Levy, plaintiff, and John Bass, herein referred to: "I know nothing about these preliminary matters my son testified to." And there is nothing in the record which tends to contradict her statement on this point. She had not been advised, nor did she know, that the debt of the cigar company to the bank had been paid, and that J. R. Levy, her son, had in effect sold her out. All of these matters were concealed from her at the time she signed the mortgage, and both plaintiff and J. R. Levy must have known that she signed it under a misapprehension of the facts 2 and circumstances leading up to and surrounding the transaction, because the record shows that when she signed the note and mortgage there was nothing owing by the cigar company to the bank. The effect of the transaction was to relieve Bass from all liability and shoulder the debt onto Mrs. Levy, who did not, either directly or indirectly, receive any consideration therefor or benefit therefrom. Nor did she know that she was assuming Bass' obligations, but, on the contrary, was led to believe that she was, as heretofore stated, securing the payment of a debt owing by the cigar company to the bank.

We are of the opinion that the sixth finding of fact made by the trial court is not only unsupported by, but is contrary to, the evidence. The finding is as follows: "That the said

note and mortgage were made, executed, and delivered by the defendant to the plaintiff for the purpose of securing a portion of certain indebtedness then and there due and owing from the Sam Levy Cigar Manufacturing Company, a corporation; and, in consideration of the execution and delivery of the said note and mortgage, the said plaintiff released and discharged the said indebtedness then and there owing by said Sam Levy Cigar Manufacturing Company to plaintiff; that the said note and mortgage were executed and delivered by defendant to plaintiff and were received by the plaintiff in good faith and without any agreement or contract, expressed or implied, upon the part of plaintiff other than is fully expressed in the terms of said note and mortgage; and the said plaintiff was not guilty of any fraud or deception or want of fair dealing in the negotiation with defendant which led up to or resulted in the giving of said note and mortgage or in any manner connected therewith."

The judgment is reversed. In view of the indefiniteness of the allegations of defendant's answer upon which she bases her defense, and because of which the plaintiff may have failed to introduce explanatory evidence, we have decided not to direct findings and judgment, but to remand the cause for a new trial, with directions to the lower court to permit the parties to amend their pleadings should they be so advised. Each party to pay his own costs on this appeal.

STRAUP. C. J., and FRICK, J., concur.

McCULLOUGH v. McCULLOUGH

No. 2056. Decided January 10, 1910 (106 Pac. 665).

APPEAL AND ERROR—JUDGMENT ROLL—BILL OF EXCEPTIONS. A motion to modify a judgment, the affidavits in support thereof and the rulings and orders of the court made in respect thereto, are not a part of the judgment roll and cannot be reviewed on appeal unless preserved by and presented on a bill of exceptions. (Page 149.)

APPEAL from District Court, Second District; *Hon. J. A. Howell*, Judge.

Action by John McCullough against Mary McCullough.

From an order vacating the order substituting as defendant the administrator of defendant, and denying a motion to modify the judgment rendered in the action, plaintiff appeals.

AFFIRMED.

V. C. Gunnell for appellant.

J. N. Kimball for respondent.

STRAUP, C. J.

In 1901, in an action wherein the appellant was plaintiff and Mary A. McCullough, defendant, a judgment of divorce was rendered on her counterclaim, in favor of the defendant, and certain real estate awarded to her. In 1902, and in that action, the appellant, by motion and on notice, asked that the decree in respect to the property awarded to defendant be modified. Upon a hearing had the motion was denied. Again, in 1905, the appellant made a similar motion, which

on a hearing was also denied. In December, 1908, the defendant died. In January, 1909, the appellant moved the court to substitute the administrator of her estate in the action, and again moved the court to modify the decree so as to award the property to the appellant. The order of substitution was made, but, on the appearance of the administrator, and on a hearing, the order was, in April, 1909, vacated, and the motion to modify the decree denied. These various motions were supported and resisted by affidavits. This appeal is taken from the order made, or judgment rendered, by the court in April, 1909, seeking to have reviewed the proceedings had with respect to them.

The respondent has challenged our power to review them because they are not preserved nor authenticated by a bill of exceptions. The appellant concedes that there is no bill of exceptions, but insists that the motions, petitions, and affidavits, and the proceedings had thereon, and the rulings and orders made in respect thereof, are a part of 1 the judgment roll, and reviewable without a bill of exceptions. We think otherwise. To properly review such rulings and proceedings, it was essential to preserve them by, and to present them on, a bill of exceptions. Without it we cannot judicially know what they were.

There not being anything before us which is reviewable, it follows that the judgment of the court below must be affirmed, with costs. Such is the order.

FRICK and McCARTY, JJ., concur.

SIERRA NEVADA LUMBER COMPANY v. McCORMICK, et al.

No. 2080. Decided January 10, 1910 (106 Pac. 666).

1. TRIAL—FINDINGS OF FACT AND CONCLUSIONS OF LAW. The findings should be limited to ultimate facts. (Page 153.)
2. TRIAL—FINDINGS OF FACT AND CONCLUSIONS OF LAW. If the court makes a finding of ultimate facts and additional findings of probative facts not shown to be the only probative facts established by the evidence, the judgment rendered in accordance with the ultimate facts cannot be attacked on the ground that the first findings are not true because contradicted by the probative facts. (Page 154.)
3. TRIAL—FINDINGS OF FACT AND CONCLUSIONS OF LAW. When the ultimate fact is found, no finding of probative facts which may tend to establish that the ultimate fact was found against the evidence can overcome the finding of the ultimate fact. (Page 154.)
4. JUDGMENT—ON TRIAL OF ISSUES—CONFORMITY TO FINDINGS. If all the probative facts are found from which the ultimate facts necessarily follow, the judgment is good, though based entirely on the probative facts. (Page 155.)
5. JUDGMENT—FINDINGS OF FACT—CONCLUSIONS OF LAW. When the ultimate fact is found, the judgment rests on it, and not on the probative facts. (Page 155.)
6. APPEAL AND ERROR—REVIEW—PRESUMPTIONS. A judgment is presumed to be correct, unless the contrary appears from the record. (Page 157.)
7. APPEAL AND ERROR—RECORD—QUESTIONS PRESENTED FOR REVIEW. Where, on appeal on the judgment roll alone, it appeared that the judgement was based entirely on a finding of the ultimate fact that a certain sum was paid on the claim in suit and not on another account, and it appeared that an additional finding of probative facts did not contain all the probative facts on which the court found the ultimate fact of payment, the judgment could not be questioned on the ground that the conclusions of law as to the application of the payment were contrary to the probative facts found. (Page 157.)

APPEAL from District Court, Third District; *Hon. C. W. Morse*, Judge.

Action by the Sierra Nevada Lumber Company against John McCormick and others.

Judgment for plaintiff. It appeals.

AFFIRMED.

Stephens, Smith & Porter for appellant.

Young & Moyle, Moyle & Van Cott and *Richards, Richards & Ferry* for respondents.

FRICK, J.

This is an action to foreclose a mechanic's lien for materials furnished by appellant as a subcontractor. The respondents Houston Real Estate Investment Company, a corporation, hereinafter styled "Company," and O. J. Salisbury, since deceased, in October, 1905, entered into a contract with their correspondents, John McCormick and George Gray, as copartners, whereby said McCormick & Gray agreed to erect a certain building, known as the New York building, for said Company and said O. J. Salisbury for a specified sum of money. Said McCormick & Gray thereafter entered into a contract with the appellant, whereby it agreed to furnish to them certain materials to be used in the construction of the building aforesaid, and it is conceded that appellant did furnish materials for said building of the value of \$11,716.45. The appellant claims that of the foregoing amount it was paid by McCormick & Gray only the sum of \$8400, while said McCormick & Gray, said Company, and Margaret Blaine Salisbury, as the executrix of the last will of O. J. Salisbury, deceased, claim that appellant was paid the sum of \$9400, or the sum of \$1000 in excess of what it concedes was paid to it. It is not necessary to refer to the other respondent, or to further state the issues. The court found that McCormick & Gray had paid appellant the sum of \$9400 to apply on the materials furnished by it, and that there was thus a balance due it from them amounting to the sum of \$2316.45,

for which judgment was entered against them, and a decree of foreclosure of the mechanic's lien was decreed against said New York building and the lot upon which it stands. Counsel for appellant in their brief state the question presented to this court by the appeal to be as follows: "The single question which arises in the case is that the application of a payment. A payment of \$1000 was made in February, 1906, by the original contractors to the plaintiff. The debtor (McCormick & Gray) did not make any application of payment. The plaintiff applied the payment to an overdue account then owing for materials furnished to the defendant contractors (McCormick & Gray) upon other accounts than the one for the erection of the New York building."

The appeal is upon the judgment roll without a bill of exceptions. The errors assigned are that the court erred in making the conclusions of law upon the ground that the conclusions are not in accordance with or are contrary to the facts as found by the court, and particularly contrary to what is designated as finding No. 5. In view that the whole question hinges upon said finding, we will set it out in full. It is as follows: "That during the month of February, 1906, the defendant Houston Real Estate Investment Company and the said O. J. Salisbury made a payment, by checks, payable to the defendants McCormick & Gray on account of said contract in the sum of \$1000, which payment was made without any express reservation or designation that said money was to be applied on account of materials furnished to said McCormick & Gray under said contract. Said check was deposited by them to the credit of their general account, with other funds, in the State Bank of Utah. That shortly thereafter McCormick & Gray drew a check for the sum of \$1000 upon their said bank account, payable to the order of the plaintiff herein, and delivered the same to the plaintiff. That said McCormick & Gray had made previous payments to said plaintiff for materials furnished under said contract, and had at all previous times designated that said payments should be applied on account of said contract, but that the pay-

ment of the said \$1000 was made without any express designation as to how the same should be applied by the Sierra Nevada Lumber Company, but that said company knew that \$1000 had come to McCormick & Gray from said Houston Real Estate Investment Company and O. J. Salisbury. That at the time of said payment to the plaintiff the defendants McCormick & Gray were indebted to the plaintiff upon an account other than the account for materials herein referred to, which account was unsecured in any way, and was in excess of the sum of \$2000, and was past due and owing for materials furnished to them prior to the commencement of the work upon the building herein referred to. That the manager of said company applied the said payment of \$1000 upon the books of the plaintiff company upon the said other account of the said McCormick & Gray, but did not communicate said fact to said McCormick & Gray. That a few days after said sum had been applied as aforesaid the said McCormick & Gray, through one of the members of said firm, directed the plaintiff to apply the said \$1000 to this account, but that said plaintiff failed so to do." Counsel for respondents McCormick & Gray, Margaret Blaine Salisbury, and said Company earnestly insist that, in view of the record in this case, we cannot pass upon the question urged by counsel for appellant. Counsel for said respondents contend that all the facts found in said finding No. 5, except the ultimate fact that McCormick in February, 1906, paid to the appellant the sum of \$1000 to apply upon the materials furnished by it for the building in question, are merely evidentiary or probative, and if in conflict with the ultimate fact if found, must be disregarded. It seems to us that, in view of the authorities, this contention is sound. It is elementary that the findings must respond to and cover the issues made by the pleadings. It is equally true that the findings should be limited to ultimate facts, since it is upon such facts that the conclusions of law and the judgment must rest. If, therefore, a judgment is supported by the ultimate facts found, it cannot be said to be con-

trary to the facts simply because some probative or 2, 3
evidentiary fact or facts may be contrary to the ultimate facts found by the court and upon which the judgment rests. The doctrine is well stated by the Supreme Court of California in the case of *Smith v. Acker*, 52 Cal. 217, wherein, in the syllabus, which clearly reflects the decision, the following language is used:

"If the court makes a finding of the ultimate facts, and also makes additional findings of probative facts, which are not shown to be the only probative facts established by the evidence, and which may have co-existed with the ultimate facts found, and judgment is rendered in accordance with the ultimate facts found, the judgment cannot be attacked upon the ground that the first findings are not true, because contradicted by the probative facts. When the ultimate fact is found, no finding of probative facts which may tend to establish that the ultimate facts was found against the evidence can overcome the finding of the ultimate fact."

The foregoing case has been frequently referred to and followed by the Supreme Court of California as appears from the following, among other, cases: *Lucas v. Richardson*, 68 Cal. 618, 10 Pac. 183; *Gill v. Driver*, 90 Cal. 72, 27 Pac. 64; *Commercial Bank v. Redfield*, 122 Cal. 405, 55 Pac. 160, 772.

The only question, therefore, is: Does finding No. 5 come within the rule laid down in the California cases above referred to? We think it does. One of the principal issues, if not the only one, as between appellant and McCormick & Gray and the other two respondents, was whether appellant had been paid \$9400 or only \$8400 upon McCormick & Gray's contract with their correspondents. In finding No. 4 the court had found that \$8400 had been paid by McCormick & Gray to appellant to apply on said contract up to a certain time. There is no dispute about this. Why the court did not include the other \$1000 with the \$8400 and then find that \$9400 had been paid in one finding can be explained only upon the theory that both the court and counsel for appellant intended the findings of evidentiary or probative facts to take the place of a bill of exceptions in which the evi-

dence adduced at the trial would be reflected, or that such findings would answer the purpose of a statement of the evidentiary facts from which the legal conclusion might be deduced by this court. Findings in this form, as is well illustrated in the case of *Smith v. Acker, supra*, are always a delicate, if not an illusory, method through which the appellate court can be asked to pass upon whether a judgment is right and according to law, or otherwise. It is true that, if all the evidentiary or probative facts are found from which the ultimate facts necessarily follow, then a judgment 4 is good, although based entirely upon probative facts. But, where the ultimate fact is found, such a finding cannot be affected or contradicted by probative facts although the latter are contrary to the former. When the ultimate fact is found, the judgment rests upon it, and not 5 upon the probative facts. The ultimate fact that McCormick & Gray paid appellant the sum of \$9400 to apply on the materials furnished by appellant for the building in question is certainly found by the court. Whether such fact is absolutely found in said finding No. 5 is not controlling. It is sufficient that the court found the fact to exist, and that the judgment is based thereon. This was really the only issue.

The real question between the two parties last above named thus was whether \$9400 or only \$8400 had been paid by McCormick & Gray upon the aforesaid contract. When this fact was ascertained and found, the court was prepared to determine the balance due to appellant from McCormick & Gray on the particular contract in question. If the court had found that only \$8400 had been paid, then appellant was entitled to judgment against McCormick & Gray for \$3316.45, but, if the finding was that \$9400 had been paid, then the judgment could be for only \$2316.45. This is the amount allowed by the court, and hence is based on the finding that the payments amounted to \$9400. While the finding on the payment of the \$1000 in finding No. 5 in addition to the \$8400 as found in finding No. 4 is not as specific as it might be, still no one

questions that the court found that the payment was made. Even counsel for appellant so state in unqualified terms in the proposition stated by them and which we have hereinbefore quoted. The only contention they make is that from the probative facts contained in finding No. 5 the court found as a conclusion of law that the \$1000 payment was applied upon the materials furnished to McCormick & Gray upon their contract with the other two respondents. It needs no argument to show that to permit the contention results in entirely ignoring the fact that the court found that McCormick & Gray had paid \$9400 on the materials furnished by appellant for the building in question, and that the judgment is entirely based upon this finding. The probative facts contained in finding No. 5, as is illustrated by the authorities cited by us, are entirely immaterial, because the judgment is not based upon the probative facts, but upon the ultimate fact found by the court. If this be sound doctrine, and we think it is, it follows as the night follows day that we cannot go beyond the ultimate fact, namely, that respondents McCormick & Gray paid \$9400 upon the materials furnished by appellant to them upon their contract with the other two respondents. According to this finding, the judgment for \$2316.45 is clearly right in amount and should thus be sustained, unless clearly in conflict with some legal principles.

In view of what has been said, it follows that we cannot, upon this record, determine the question whether the \$1000 should have been applied as the court applied it or not. But, even though we were wrong in the foregoing contentions in so far as they apply to the facts found in this case, and we could consider the probative facts found by the court in said finding No. 5, yet it does not appear therefrom that all the probative or evidentiary facts upon which the court based the ultimate fact of payment are found. The only reason that counsel urge why appellant had the legal right to apply the \$1000 upon another debt owing by McCormick & Gray is that neither the company nor O. J. Salisbury, when the payment was made by them to McCormick & Gray, expressly

directed how the money should be applied, and that McCormick & Gray gave no express directions to appellant at the time the payment was made by them how the application thereof should be made. The difficulty with this contention is that it is not made to appear that the court's finding contained all the probative or evidentiary facts from which the court deduced or found the ultimate fact of payment. It may well be that the court based its finding that the \$1000 was paid upon the materials furnished for the building in question upon an implied rather than upon an express direction as to how the payment should be applied.

In order, therefore, to authorize us to determine whether the judgment is erroneous upon the ground that under the evidence the court ought to have found that the \$1000 payment was not made to apply upon the materials furnished for the building in question, but was to apply upon another account owing by McCormick & Gray to appellant, we should have all the evidence upon that subject, direct and inferential, upon which the trial court acted or had the right to act before us. The presumption that the judgment 6 is correct must prevail until it is clearly made to appear from the entire record upon which it is based that it is not so. This presumption is not overcome by the evidentiary facts contained in finding No. 5, even though we could consider them in opposition to the ultimate fact that \$9400 was paid upon the materials furnished for the building in question. The finding in this regard should have been either that \$9400 or \$8400 was paid on the materials aforesaid, and, if either party desired to question the correctness of such a finding on appeal, all the evidence relating to or upon which the finding is based should be brought to this court by a bill of exceptions or upon an agreed statement of facts in which all the facts relating to the finding are contained. No doubt a party may request the trial court to find all the evidentiary or probative facts upon which the ultimate fact is to be deduced or found, and, if the court will 7 state that the probative facts as found are all the facts

and inferences from which the court finds and makes the conclusions of law, then the appellate court may determine whether the conclusions are correct or not. If such a course is pursued, it is apparent from the authorities cited, however, that the court cannot also find the ultimate fact if such finding should be contrary to the probative facts.

From the authorities cited, it is manifest that we are bound by the ultimate fact of payment as found by the court, regardless of what may be deduced from the probative facts so found. The judgment therefore ought to be, and it accordingly is, affirmed, with costs to respondents.

STRAUP, C. J., and McCARTY, J., concur.

GIBSON v. McGURRIN et al.

No. 2060. Decided January 10, 1910 (106 Pac. 669).

1. QUIETING TITLE—PLEADING POSSESSION. Under Comp. Laws 1907, sec. 3511, providing that an action may be brought by any person against another who claims an estate or interest in real property, adverse to him, to determine such adverse claim, a complaint in an action to quiet title need not allege possession of the property in plaintiff.¹ (Page 165.)
2. JURY—RIGHT TO TRIAL BY JURY—WAIVER. Const., art. 1, sec. 10, provides that a jury in civil cases shall be waived unless demanded. Comp. Laws 1907, sec. 3129, provides that a jury must be demanded prior to the time of setting such action for trial, or within such reasonable time thereafter as the court may order, and the applicant must at the same time deposit with the clerk the sum of five dollars. *Held* that, where a claimant to property sues, either under Comp. Laws 1907, sec. 3511, to quiet title, or in ejectment, and does not demand a jury trial, he waives his right to a jury trial.² (Page 167.)
3. QUIETING TITLE—EJECTMENT—CHOICE OF REMEDIES. One who is not in possession of real property, and who claims the title thereto,

¹ Wey v. Salt Lake City, 101 Pac. 381.

² State v. Cherry, 22 Utah, 1, 60 Pac. 103.

may either bring an action to quiet title, under Comp. Laws 1907, sec. 3511, providing that an action may be brought by any person against another who claims an estate or interest in real property adverse to him, to determine such adverse claim, or he may sue in ejectment. (Page 167.)

4. **QUIETING TITLE—NECESSITY FOR PROVING POSSESSION.** One who claims the title to property, and brings an action to quiet title, under Comp. Laws 1907, sec. 3511, providing that an action may be brought by any person against another who claims an estate or interest in real property, adverse to him, to determine such adverse claim, need not prove that he is in possession, or entitled thereto, but it is sufficient if he establishes that the legal title is in him, and that defendants have no right, title, or interest adverse to him in the premises. (Page 167.)
5. **QUIETING TITLE—EVIDENCE OF POSSESSION.** On proof by plaintiff, in an action to quiet title, that the legal title is in him, the law presumes that he was in constructive possession; and, in the absence of evidence to the contrary, it will be presumed that he was entitled to the actual possession of the land in controversy, and proof that the legal title is in plaintiff is sufficient to support a finding that he is entitled to possession. (Page 167.)
6. **STIPULATIONS—CONSTRUCTION—STIPULATION AS TO EVIDENCE.** In an action to quiet title, defendant's objection to the introduction of any evidence on the ground that the complaint did not state a cause of action, that it did not allege possession by plaintiff, nor show by what right plaintiff claimed to be the owner, nor by what right he claimed to be entitled to possession, was overruled, and a patent covering the land in question was admitted in evidence for plaintiff, and a deed from the grantee in the patent which referred to the patent and conveyed a part, if not all, of the land described in the patent, was offered. Defendants thereupon agreed to shorten the record by merely giving the grantors and grantees and the description of the property, conceding that "the description was the one in question," and to allow the deed offered by plaintiff to be received in evidence subject to the general objection already made, and plaintiff offered in evidence, subject to the same objection, deeds which showed a chain of title from the grantee in the patent to himself. *Held*, that the finding of the court, that the property described in the complaint was included in the description in the patent was sustained by the evidence; the admission by counsel being in effect that the description in the complaint was covered by that in the patent and deeds. (Page 168.)

APPEAL from District Court, Third District; *Hon. C. W. Morse*, Judge.

Action by Judge George J. Gibson against Frank E. McGurrin and others.

Judgment for plaintiff. Frank E. McGurrin and others appeal.

AFFIRMED.

Geo. W. Bartch and *O. A. Murdock*, for appellants.

J. Walcott Thompson for respondent.

APPELLANTS' POINTS.

The general rule is, both in equity and under statute which do not expressly grant the action, for the purpose here sought, to one out of possession, "that a bill either to quiet title or to remove a cloud can be maintained only where the plaintiff is in actual possession." (17 Enc. Pl. and Pr. 306. 17 Enc. Pl. and Pr. 307-309; *Mining Co. v. Mining Co.*, 5 Utah 3, 39-43, 56-59, 64; 6 Am. Eng. Enc. of Law 159; 1 Story, Eq. Jur., Secs. 76, 616, 619; *Ashurst v. McKenzie*, 92 Ala. 484; 4 Pomeroy's Eq. Jur., Sec. 1396; *Richie v. Dorland*, 6 Cal. 33; *Kunkle v. Lumber Co.*, 29 Utah 21; *Perigo v. Dodge*, 9 Utah 3; *Park v. Wilkinson*, 21 Utah 279, 285. *Pratt v. Pond et al.*, 5 Allen 59.)

Where, as in this case, the plaintiff is not in possession of the land, but asserts title in himself and questions the validity of the defendants' title, who are in possession, the defendants have the right to have the question of title tried by a jury, and a court of equity has no jurisdiction to try the case. (1 Story Eq. Jur., sec. 76; *Tarpey v. Salt Co.*, 5 Utah, 213; *Spithill v. Jones*, 3 Wash. 290; *Plant v. Barclay*, 56 Ala. 561; *Daniel v. Steward*, 55 Ala. 278; *McLean v. Presley*, 56 Ala. 211; *Herr v. Martin*, 90 Ky. 377; *Branch v. Mitchell*, 24 Ark. 439; *Alton & M. F. Ins. Co. v. Buckmaster*, 13 Ill. 205; *Smith v. McConnell*, 17 Ill. 135. *Holtz v. Berg-*

mann, 6 Pa. Dist. Rep. 217; *Long's App.*, 92 Pa. St. 171; 6 Am. and Eng. Ency. of Law 159; *Curtis v. Sutton*, 15 Cal. 260.) This was a suit to remove a cloud or to quiet title to real property, and hence a suit in equity, and when the plaintiff brought the suit he was admittedly out of possession, and had an adequate and complete remedy at law which he ought to have pursued. (1 Story Eq. Jur., sec. 616, 619, 711-a; 17 Enc. Pl. and Pr., 290-291, 293; *Mining Company v. Mining Company*, 5 Utah 3, 39-43, 57-59; *Mont. Ore. P. Co. v. Boston & M. Con. C. & S. Co.*, 70 Pac. 1114, 1119-1122; 27 Mont. 288; *Newman v. Duane*, 89 Cal. 527, 27 Pac. 66; *Ezelle v. Parker*, 41 Miss. 520; *Huntington v. Allen*, 44 Miss. 654; *Curtis v. Sutter*, 15 Cal. 260; *Harrigan v. Mowry*, 84 Cal. 456; *Whitehead v. Entwistle*, 27 Fed. Rep. 778; *Newman v. Westcott*, 29 Fed. 49; *Harland v. Bankers, etc. Tel. Co.*, 33 Fed. 199; *Taylor v. Clark*, 89 Fed. 7; *Central Pacific R. R. Co. v. Dwyer*, 1 Sawy. [U. S.] 641.)

RESPONDENT'S POINTS.

This is not a suit in equity to quiet title to real estate. It is an action to determine an adverse claim under section 3511 C. L. Utah 1907. The statutes of this state provide that: "There is in this state but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs," to be commenced by complaint, containing "a statement of the facts constituting the cause of action, in ordinary and concise language" and "a demand of the relief which the plaintiff claims." (Compiled Laws of Utah, 1907, secs. 2852, 2960.) Under precisely similar statutes of the Territory of Montana and New Mexico it has been decided by the Supreme Court of the United States that both legal and equitable relief may be granted in the same action and may be administered through the intervention of a jury or by the court itself, according to the nature of the remedy sought. (*Hornbuckle v. Toombs*,

18 Wall. 684, 21 L. Ed. 966; *Herschfield v. Griffith*, 18 Wall. 657, 21 L. Ed. 968; *Davis v. Bilsland*, 18 Wall. 659, 21 L. Ed. 969; *Basey v. Gallagher*, 20 Wall. 670, 22 L. Ed. 452.) Under the present statute the allegation of possession is unnecessary. (*Ely v. N. M. & Ariz. R. R. Co.*, 129 U. S. 291, 32 L. Ed. 688; 2 Estee's Pleading, sec. 2508; *Landregan v. Peppin*, 94 Cal. 467.) A judgment of nonsuit is improper where plaintiff establishes any legal interest in the property. (*Peterson v. Gibbs* [Cal.], 81 Pac. 121.) When the paramount title is shown to be in respondent, the law raised the presumption of the right to possession, and it is unnecessary to prove his right. (*Flood v. Templeton* [Cal.], 92 Pac. 78, 13 L. R. A. [N. S.], 579, 586; *Cottrell v. Pickering*, 32 Utah 62, 67.)

FRICK, J.

The respondent, in substance, alleged in his complaint that at the time of the commencement of the action he was the owner and entitled to the possession of a certain parcel of land in Salt Lake County, describing it; that the defendants, including the appellants, claimed and asserted some estate or interest in and to said premises adverse to the respondent; that such claim was without right, and that said defendants, nor either of them, had any estate, right, title, or interest whatever in said premises. Upon these allegations respondent prayed that the defendants be required to set forth the nature of their said claims; that it be adjudged that the respondent is the owner of said land, and that the defendants, nor either of them, have any estate or interest whatever therein; that they, and each of them, be enjoined from asserting any claim whatever adverse to respondent in said premises, and for general relief. To the foregoing complaint Frank E. McGurrian, Jennie D. McGurrian, Stephen Hays, and Mary Hays, who are, and hereinafter will be, styled appellants, demurred upon substantially the following grounds: (1) That the complaint does not state facts sufficient to constitute a cause of action; (2) that the complaint

is insufficient because it does not allege that respondent is in possession of the land; (3) that the complaint is insufficient because it is not made to appear therefrom "by what right or title the plaintiff (respondent) claims to be the owner" of said land; (4) that the complaint is insufficient because "it does not show by what right or authority the respondent claims to be entitled to the possession of the land described." The demurrer was overruled, and the defendants designated as appellants filed a general answer, in which they denied that the respondent is the owner and entitled to the possession of the land described in his complaint. They admitted that they claimed and asserted some right and interest to said land and to the whole thereof. Further answering, and by way of counterclaim, the appellants above named claimed to be the owners and in possession of the land described in plaintiff's complaint (the description of the land in the answer is the precise description contained in the complaint); that the respondent claimed and asserted some right or interest in said land adverse to said appellants; that said claim is without right, and that said respondent has no right, title, estate, or interest in said land whatever. They prayed that the title to said land be quieted in them, and for general relief. Respondent filed a reply to the counterclaim, which was, in effect, a general denial. The other defendants are not here complaining, and hence need not be further considered.

When the case came on for trial, the appellants by their counsel "objected to the introduction of any evidence under the complaint in this case, for the reasons set forth in our demurrer." Counsel then stated the grounds of the objection substantially as they are stated in the demurrer, which we have already set forth. The objection was overruled, and counsel saved an exception. The respondent, in support of his allegations of ownership, then offered in evidence the record of a patent, in which the land in question, with other land, was, by the United States, conveyed to one Lorenzo Pettit of Salt Lake County. Counsel for appellants objected to the introduction in evidence of this patent, upon the

general grounds above set forth and upon no others. The court overruled the objection, and admitted the patent in evidence, and counsel duly excepted. Respondent then offered in evidence the record of a deed from said Pettit and wife to one Samuel M. Green. At this point a controversy arose, and the bill of exceptions shows that the following proceedings were had: Mr. Bagley, one of the counsel for appellants, addressing himself to respondent's counsel, said, "We are perfectly willing you might shorten this record by giving the grantors and grantees and description of the property." Counsel for respondent, addressing himself to Mr. Bagley, asked, "Concede the description is the one in question?" to which Mr. Bagley replied, "Yes." The court then said: "Let the record show each instrument is introduced. A copy may be procured later if necessary to preserve the record." The deed was admitted in evidence over appellants' general objection; then counsel for respondent said, "Then let the record show deed from Samuel M. Green to Franklin Farrel is considered introduced in evidence in full." Counsel for appellants, in referring to respondent's counsel's suggestion, said: "Subject to the general objection we made," and counsel for respondent agreed to this, and then proceeded in the manner indicated by the court, and offered certain deeds in evidence, the last of which was a conveyance to the respondent herein. Starting thus with the patent from the United States, respondent had by mesne conveyances shown record title in himself, and when this had been done, he rested his case. After respondent rested counsel for appellants moved for a nonsuit upon substantially the grounds set forth in the demurrer to which we have referred, and upon the further grounds that the evidence was insufficient to show that respondent was entitled to the possession of the premises in question; that respondent "brought an equitable action, while the proof shows that nothing but a purely legal question is involved, namely, the title to real property;" that "a court of equity has no jurisdiction to try this case; the only question involved being a question of law." The court denied

the motion for a nonsuit, whereupon the appellants also rested, and submitted the case upon the evidence adduced by respondent. The court thereafter found the issues in favor of respondent, and entered a judgment in accordance with the prayer of his complaint. The appellants above named present the record for review on appeal.

The first assignments of error to be noticed are that the court erred in overruling the demurrer of appellants, and in denying their motion for nonsuit. The grounds stated in both the demurrer and motion for nonsuit blend, and may be considered together. The action is based on section 3511, Comp. Laws 1907, which is as follows: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." Counsel for appellants earnestly contend that an action to quiet title is purely equitable; that in such an action the courts have always held that it was necessary for the plaintiff to allege and prove that he was in possession of the real property in question; that if the plaintiff was not in possession, his action was one in ejectment to try title and to oust the defendant; and that section 3511, *supra*, does not change the rule. We cannot agree to this contention.

The Supreme Court of California, in *Castro v. Barry*, 79 Cal., at page 446, 21 Pac. 946, clearly points out the distinction between an action under section 3511 and the ancient action to quiet title. In an action based on section 3511 the plaintiff need not allege possession, nor need 1 he prove it, except by inference, by showing that, as against the defendant in the action, the plaintiff had the legal title. In other words, that the plaintiff is the owner, and that the defendant has no interest or estate in the property in question. This is the view that is entertained by the Supreme Court of the United States, as appears from the cases of *Devine v. Los Angeles*, 202 U. S. 333, 26 Sup. Ct. 652, 50 L. Ed. 1046, and *Ely v. New Mexico, etc., Ry. Co.*, 129 U. S. 291, 293, 9 Sup. Ct. 293, 294, 32 L. Ed. 688.

In the latter case, at page 293, in referring to the statute of Arizona, in terms precisely like section 3511, *supra*, it is said:

"The manifest intent of the statute . . . is that any person owning real property, whether in possession or not, in which any other person claims an adverse title or interest, may bring an action against him to determine the adverse claim and to quiet the plaintiff's title. It extends to cases in which the plaintiff is out of possession, and the defendant is in possession, and in which, at common law, the plaintiff may have maintained ejectment. An allegation, in ordinary and concise language, of the ultimate fact that the plaintiff is the owner in fee is sufficient, without setting out matters of evidence, . . . and an allegation that the defendant claims an adverse estate or interest is sufficient, without further defining it, to put him to a disclaimer."

The section was also referred to by Mr. Chief Justice Straup in *Wey v. Salt Lake City*, 101 Pac. 381, 35 Utah 504, where it was held that section 3511 has "enlarged the ancient jurisdiction of courts of equity in respect of suits to quiet title and to determine adverse claims." The foregoing is in strict harmony with the holding of the Supreme Court of the United States, as is manifest from what we have quoted from that court, and is likewise in harmony with the holding of the Supreme Court of California, as appears from the case cited and from other cases. Without referring to other cases it is sufficiently clear that under the authorities the complaint stated a cause of action, and the court therefore committed no error in overruling the demurrer.

The contention that because respondent relied wholly upon his legal title the action was one at law, and not in equity, and that appellants were therefore entitled to a jury trial, in view of the record, is not tenable. Assuming, without deciding, that where in an action based on section 3511 a plaintiff relies upon his legal title merely, the defendant is entitled to a trial by jury, yet that question is not properly before us for determination. In this state a jury in civil actions is waived unless demanded. Section 10, art. 1, of the Constitution provides that "a jury in civil cases shall be waived unless demanded." Pursuant to this provision, section 3129, Comp. Laws 1907, was adopted. That section, in substance, provides that a jury must be de-

manded "either . . . prior to the time of setting 2
such action for trial or within such reasonable time
thereafter as the court may order . . . and [the appli-
cant] must at the same time deposit with the clerk the
sum of five dollars." In *State v. Cherry*, 22 Utah, 1, 60
Pac. 1103, this court held that the provisions of the forego-
ing statute were not in conflict with section 10, art. 1, of the
Constitution, and that in order to be entitled to a jury a
party must make the demand and deposit as the statute re-
quires. In this case there is nothing to indicate that the
respondent ever demanded a jury. Upon the contrary, the
usual preliminary statement to the findings of fact signed by
the judge is that "a jury having been waived by the re-
spective parties, the court, sitting without a jury," proceeded
to try the case. If the action, therefore, had been a law
action, pure and simple, appellants are not in a position to
claim error upon the grounds that they were deprived of a
jury trial. Nor can the contention prevail that appellants
were misled by the form of the action, and therefore did not
demand a jury. They must be deemed to have known that
respondent might rely upon his legal title merely. In view
of section 3511 he had a choice of remedies. He could sue
in ejectment or under said section. In either case,
if appellants desired a jury trial, they were required 3
to demand a jury in accordance with the statute,
which they have not done.

It is also asserted that there is no evidence to sustain the
court's findings that the respondent was entitled to the pos-
session of the land in controversy. We have already pointed
out that a party out of possession may bring an action under
section 3511, as well as one in possession, and that he need
not allege that he is in or entitled to possession. If this need
not be alleged, it need not be proved. So far as appellants
were concerned, it was quite sufficient if the respondent es-
tablished that the legal title was in him, and that the ap-
pellants had no right, title, or interest adverse to him in
the premises in controversy. If they had no valid
claim to, or interest in, the premises in question, the 4, 5

respondent's title, as against them at least, ought to prevail. But, if we assume that, in view that respondent had alleged in his complaint that he was entitled to possession, therefore he had to support this allegation by proof, we think the record discloses that he did so. When he had proved the legal title was in him, then the law presumed that he was in constructive possession, and, in the absence of all evidence to the contrary, that he was entitled to the actual possession. (*Flood v. Templeton*, 152 Cal. 148, 92 Pac. 78-84, 13 L. R. A. (N. S.) 579; *Cottrell v. Pickering*, 32 Utah, 62, 88 Pac. 696, 10 L. R. A. [N. S.] 404.) If the finding was at all material, it was therefore supported by sufficient evidence.

The contention that the finding of the court that the property described in the complaint was included within the description contained in the patent introduced in evidence is not supported by evidence cannot be sustained. It is true that there was no direct evidence offered by respondent to show that the property described in the complaint was included in the patent which was introduced in evidence. Such proof was, however, made unnecessary by the admissions of appellant's counsel, the substance which we have set forth in this opinion. The admissions made 6 by counsel that the description in the deeds offered by respondent included the land described in his complaint also covered the patent. As appears from the patent, one Lorenzo Pettit was the grantee therein. The land in controversy is only a small portion of the lands described in the patent, and this is likewise true with regard to a number of the deeds offered in evidence. When the patent was offered in evidence no objection was made that the land in controversy was not covered by the patent. The next deed in the chain of title offered in evidence was one from Lorenzo Pettit, the grantee in the patent, to one Samuel M. Green. The admission that the description in all the deeds referred to covered the land in controversy was made when this deed was being discussed and offered in evidence; and, as this deed directly referred to the patent, and as Mr.

Pettit, by this deed, conveyed a part if not all the lands described in the patent to Mr. Green, the admission covered the land in the patent, as well as in the subsequent deeds. To hold otherwise would result in permitting appellants to take advantage of a mere technicality. To prove that the land in question was included within the description contained in the patent and deeds, all of which described more land, or at least by a different description than the description contained in the complaint, was merely a formal matter, and no doubt would have been affirmatively met by respondent, if counsel for appellants had not frankly admitted that the land in controversy was in fact covered by the descriptions contained in the instruments offered in evidence in support of respondent's title. It is apparent, therefore, that both the court and counsel assumed and were justified in assuming, that counsel for appellant conceded that the description in the complaint was in fact covered by the description contained in the patent and deeds offered in evidence by respondent, and that no other identification except counsel's admission was required. This, in our judgment, was the purpose, and is clearly the effect of counsel's admission, and hence the court did not err in making the finding complained of.

All the other assignments made by appellants, except the one relating to the bill of exceptions, are covered by what has already been said, and hence need no further consideration. The contention that the court erred in incorporating certain matters into the bill of exceptions, in review of the result reached, is immaterial. Nor is it necessary to refer to respondent's assignment of cross-errors. These, as well as all other objections urged by him, are immaterial, in view of the result.

The judgment is therefore affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

SALT LAKE CITY v. HOWE.

No. 2050. Decided January 10, 1910 (106 Pac. 705).

1. **FOOD—ORDINANCES—VALIDITY—POLICE POWER—SALE OF MILK—OTHER PROVISIONS.** Comp. Laws 1907, sec. 206, subd. 44, authorizes municipal corporations to regulate the sale of meats, fish, butter, and all other provisions. Subdivision 45 authorizes them to provide for, and regulate, the inspection of meats, butter, etc., and all other provisions. Subdivision 65 authorizes regulations to secure the general health of the city, and prevent the introduction of contagious disease, and subdivision 88 authorizes cities to pass all ordinances, and make all regulations necessary to preserve the health of the inhabitants. *Held*, that a municipality was authorized to enact an ordinance regulating the inspection and sale of milk and making it an offense to sell milk within the city without a permit from the city food and dairy commissioner, though milk was not specifically included in the statutes as a subject of regulation, it being included in the term "other provisions" in subdivisions 44 and 45, and the ordinance was also authorized under the city's power under subdivisions 65 and 88 to enact ordinances for the protection of health. (Page 173.)
2. **MUNICIPAL CORPORATIONS—POLICE POWERS—LEGISLATIVE AUTHORITY—CONCURRENT REGULATIONS.** The Legislature can confer police powers upon a city over subjects included within existing statutes, and authorize it to prohibit and punish by ordinance acts which are also prohibited and punishable by the statute. (Page 174.)
3. **MUNICIPAL CORPORATIONS—ORDINANCES—VALIDITY—CONFLICT WITH STATUTES—PENALTIES.** An ordinance made it unlawful to bring milk into the city to sell or offer for sale without a permit from the city dairy and food commissioner, and imposed a penalty for its violation of not less than fifty dollars or more than two hundred dollars, or by imprisonment in the city jail for not more than one hundred days, or both. Comp. Laws 1907, tit. 18, secs. 729-746x39, creates the office of state dairy and food commissioner, prescribes his powers and duties, and prohibits the sale of improper milk and other dairy products, but does not otherwise regulate the sale of milk or require a license for its sale. The penalty imposed for its violation is a fine of not less than fifty dollars or more than two hundred dollars. *Held* that, as the statute did not prohibit and punish the same acts as the ordinance, the latter did not conflict with the statute in imposing a different penalty than provided by it, and was valid; Comp. Laws 1907, sec. 206, subd. 88, permitting the punishment of violations of ordinances by fine in any sum less than three hundred dollars, or imprisonment not exceeding six months, or both. (Page 175.)

4. MUNICIPAL CORPORATIONS—ORDINANCES—SUBJECTS AND TITLES.
In the absence of constitutional or statutory direction, a municipal ordinance need not contain a title fully expressing the subject-matter of the ordinance. (Page 176.)
5. MUNICIPAL CORPORATIONS—ORDINANCES—SUBJECTS AND TITLES.
Const., art. 6, secs. 22, 23, requiring statutes to contain but one subject, to be clearly expressed in their titles, are not applicable to municipal ordinances. (Page 176.)

Appeal from District Court, Third District; *Hon. Geo. G. Armstrong*, Judge.

H. E. Howe was convicted of selling milk without obtaining a permit, in violation of a municipal ordinance, and he appeals.

AFFIRMED.

D. W. Moffat for appellant.

H. J. Dininny and *P. J. Daly* for respondent.

STRAUP, C. J.

A complaint was filed against the defendant in the city court of Salt Lake City, in which it was alleged that the defendant was engaged in the purchase and sale of milk in that city, and that he brought milk into that city and there had in his possession and offered it for sale, and sold it, without obtaining a permit from the food and dairy commissioner of the city, contrary to the provisions of section 256, chap. 19, as amended, of the Revised Ordinances of the city. From a judgment of conviction the defendant took an appeal to the district court. Upon a trial *de novo* in that court the defendant was again found guilty, and adjudged to pay a fine of fifty dollars. From that judgment the defendant has taken an appeal to this court.

He claims the ordinance is invalid. The ordinance among other things, provides for the appointment of a food and dairy commissioner of the city, and gives him power "to enforce in Salt Lake City" all ordinances and laws "re-

garding the production, manufacture or sale of dairy and creamery products, or the adulteration of any article of food, and regarding the use of skimmed or adulterated milk, and the feeding of unwholesome food to cattle, and the keeping of cattle having infectious or contagious diseases," and confers other duties and powers on him with respect to the inspection of premises where cows are kept for the production of milk, and the inspection and sale of milk and other food products. The section of the ordinance alleged to have been violated is as follows: "It shall be unlawful for any person to bring or send into Salt Lake City, for sale, either at wholesale, or retail, or to offer for sale, or have in possession, with intent to sell therein, any milk without having obtained from the said commissioner, annually a permit in writing so to do; and shall then pay to said commissioner the annual license provided by ordinance for carrying on such business. Such permit shall be given by said commissioner (when) upon inspection of the premises where cows are kept, and inspection of the vessels used to hold such milk, and test of the milk, it shall appear that said premises and vessels are kept in good sanitary condition, and that the milk meets the requirements of the ordinances and the rules of the Board of Health of the city, and upon condition that none but pure unadulterated milk shall be sold." It is urged that the municipality was without power to pass the ordinance. It is conceded, as is stated by the appellant, that a municipality can exercise such powers only as have been either expressly or by necessary or fair implication conferred upon it, or such as are essential to the declared objects and purpose of the municipal corporation. Among the general powers conferred upon municipal bodies are the following (subdivision 44, sec. 206, Comp. Laws 1907): "To provide for the place and manner of the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, and regulate the selling of the same." (Subdivision 45:) "To provide for and regulate the inspection of meats, fruits, poultry, fish, butter, cheese, lard, vegetables, flour, meal, and all other provisions." (Subdivision

65:) "To make regulations to secure the general health of the city, to prevent the introduction of contagious, infectious, or malignant diseases into the city, and to make quarantine laws and enforce the same within the corporate limits, and within twelve miles thereof. To create a board of health and prescribe the powers and duties of the same." Subdivision 88: "To pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or for discharging all powers and duties conferred by this title (title 13, secs. 169-313x2, Comp. Laws 1907), and such as are necessary and proper to . . . preserve the health . . . of the inhabitants" of the city. It is observed that milk is not enumerated with the specifically enumerated articles mentioned in subdivisions 44 and 45, and because of that, and the further contention that 1 it is not included in the term "other provisions" it is urged that no power was conferred upon the municipality to provide for the manner of sale, or for the inspection of milk, or to regulate the sale of the same. We think it is included in the term "other provisions."

It is true, as was said by the court in the case of *Gundling v. City of Chicago*, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230, where the court had under consideration a provision similar to those of subdivisions 44 and 45 of our statute, "the term 'other provisions,' by a familiar canon of construction, can extend only to articles of the same character as those specifically enumerated. When general words follow an enumeration of particular things, such words must be held to include only such things or articles as are of the same kind as those specifically enumerated." But we think, as was there held, that the term includes all articles or products of food for man. So holding is but applying it to "such things or articles as are of the same kind as those specifically enumerated."

Furthermore, we are of the opinion that ample power is also conferred upon the municipality to regulate the sale of milk, and to require a permit to be obtained by persons selling or offering to sell it within the city, as provided by

the ordinance, because of the provisions of subdivisions 65 and 88, which gave the city council the power "to make regulations to secure the general health of the city, and to prevent the introduction of contagious, infectious, or malignant diseases into that city," and "to pass all ordinances and rules, and make all regulations . . . which are necessary. . . . to preserve the health" of the inhabitants of the city. In the case of *People v. Vandecarr*, 175 N. Y. 441, 67 N. E. 913, 108 Am. St. Rep. 781, in which the authority of the board of health to require persons to obtain a permit "in order to receive, hold, offer for sale and deliver milk" within the city of New York was drawn in question, the court said: "Where many articles for table consumption by all classes of the community are liable to pass through processes and conditions little short of appalling unless regulated by law, the full and vigorous exercise of the police power in the interests of the public health and general welfare is absolutely essential." We are of the opinion that the provisions of the ordinance here drawn in question are within the powers delegated to the municipality.

There is a general statute (title 18, sections 729-746x39, Comp. Laws 1907, p. 379) relating to "dairy and food products," creating the office of a state dairy and food commissioner, prescribing his duties and powers, regulating sanitary conditions of premises where cows are kept for the production of milk, and forbidding the sale of adulterated, unwholesome, and impure dairy products, including milk. It is insisted that by such general statute "the state has provided in detail for state inspection and regulation" of dairy and food products, and for that reason it was not competent for the municipality to regulate the sale and inspection of milk within the corporate limits, and as provided by the ordinance. In the first place the Legislature could confer police powers upon the municipality over subjects within the provisions of existing state laws, and au- 2
thorizes it, by ordinance, to prohibit and punish acts which are also prohibited and punishable as misdemeanors under the general statutes of the state. (25 Cyc. 696, 698.)

In the next place the general statute does not undertake to prescribe the conditions under which milk or other dairy products may be sold, nor does it undertake to regulate the sale of them, except that it forbids the sale of adulterated, unwholesome, and impure dairy and other food products. The subject requiring persons who are engaged in selling milk or other dairy or food products or having them in their possession or offering them for sale to obtain a permit is not referred to in the general statute, nor is there anything in the general statute, either in express terms or by implication, by which a privilege or license is granted to sell them without a permit. The ordinance requiring a permit to be obtained to sell milk is not inconsistent with the statute, nor is it claimed that the ordinance in such particular contravenes the statute. It is, however, contended that the ordinance transgresses the statute in the particular, that in the former the penalty imposed for a violation of the ordinance is a fine of not less than fifty dollars nor more than two hundred dollars, or by imprisonment in the city jail not more than one hundred days, or by both such fine and imprisonment, while under the latter the penalty imposed is a fine of not less than fifty dollars nor more than two hundred dollars. The prohibited and punishable acts with respect to which the penalties are imposed by the statute do not pertain to the subject of regulating the sale of milk or other dairy or food products. They relate to other and different acts and subjects. The penalty imposed by the ordinance, so far at least as it relates to the prohibited acts of selling milk, or bringing it into the city, or offering it, for sale, without a permit—the committed acts charged in the complaint—is therefore not in conflict with any penalty imposed by the statute relating to such a subject. By virtue of the police powers conferred upon it by the subdivisions of section 206, heretofore referred to, the municipality was authorized to provide for the inspection of milk and to regulate the sale of it within its corporate limits so long as the municipality did not forbid that

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which was licensed or permitted by the state, nor permit or license that which was interdicted by the state.

The prohibited and punishable acts of the ordinance drawn in question not being in conflict with any law of the state, and the specific penalties prescribed by the state not relating to such acts, the municipality could impose any penalty relating to them within the limitation prescribed by law, which is a fine in any sum less than three hundred dollars or by imprisonment not to exceed six months, or by both such fine and imprisonment. (Subdivision 88, section 206, Comp. Laws 1907.)

It is further contended that the ordinance is void because "the subject is not clearly expressed in its title." The title and enacting clause are as follows: "An ordinance amending, revising, and re-enacting chapter 19, sections 240 to 267 inclusive, of the Revised Ordinances of Salt Lake City of 1903. Be it ordained by the City Council of Salt Lake City, Utah." There is nothing in the Constitu- 4
tion nor in the statute requiring the subject to be expressed in the title; nor is there anything in either prescribing or defining enacting clauses of ordinances. "It is well settled that, when there is no constitutional or statutory provision as to the mode of enactment or conditions precedent thereto, the municipal body may then prescribe its own rules, or pursue its own method." (28 Cyc. 353.) It is not claimed that there is a statute prescribing or defining enacting clauses of ordinances. It is claimed that by reason of sections 22, 23, art. 6, State Const., it was essential that the ordinance contain but one subject, 5
which was required to be clearly expressed in its title.

A mere reading of these sections is sufficient to show that they have no application to municipal ordinances or bodies.

The validity of other provisions of the ordinances is also questioned; but, as they are not involved in this litigation, it is unnecessary to express an opinion on them.

We think the judgment of the court below ought to be affirmed. It is so ordered.

FRICK and McCARTY, JJ., concur.

BOWN v. OWENS.

No. 2023. Decided January 10, 1910 (106 Pac. 708).

1. **TAXATION—WRONGFUL ENFORCEMENT—INSTRUCTIONS.** In an action against a county treasurer for conversion of sheep sold for taxes, where plaintiff contended that the assessor of Garfield County had no authority to assess the sheep, because plaintiff was a resident of Wayne County, and had ranged his sheep part of the time during the year in Wayne County and part of the time in Garfield County, so that the sheep were taxable only in Wayne County under Laws 1901, c. 105, sec. 6, providing that the taxes for live stock owned by residents of the state, and driven from one county to another for grazing, and which graze for any portion of the year in the county where owned, shall be paid in that county, thus making the result of the case depend upon the question whether plaintiff was a resident of Wayne County, whether he had a number of sheep in Garfield County which did not range in Wayne County part of the time that had been assessed in Garfield County for taxation, and whether the sheep ranging in Garfield County were there subject to taxation, a charge to find for plaintiff if he was a resident of Wayne County, and if the sheep assessed in Garfield County were grazed any portion of the year in Wayne County, but to find for defendant if plaintiff was not a resident of Wayne County, or if the sheep assessed in Garfield County grazed the entire year there, and no part of the year in Wayne County, was proper, though it did not state the things required by statute to make a lawful assessment, levy, and collection of the tax, and that it was essential for the jury to find that the law in such particulars had been complied with before defendant could recover. (Page 185.)
2. **APPEAL AND ERROR—QUESTIONS PRESENTED IN TRIAL COURT—CHANGE OF OBJECTION ON APPEAL—DIRECTION OF VERDICT.** A party cannot impute error to the court in refusing to direct a verdict on a motion in which the grounds were not specified, nor upon grounds not specified, in the lower court, unless the defect was incurable, and the party against whom the motion was directed was in no event entitled to recover; and hence, in an action for conversion for selling sheep for taxes, where the ground for motion for a directed verdict in the lower court was that defendant's evidence failed to show legal justification for the seizure and sale of the property, and was insufficient to make up any legal justification for his act, as pleaded, error in refusing a directed verdict thereon could not be assigned on the ground that the evidence was insufficient to show that the delinquent tax list was published according to law.¹ (Page 186.)

¹Smalley v. Railroad, 34 Utah, 423, 98 Pac. 311.

3. **TAXATION—WRONGFUL ENFORCEMENT—CONVERSION—ACTS CONSTITUTING—TAKING POSSESSION OF PROPERTY.** Where sheep, alleged to have been unlawfully seized and sold for taxes, were not taken from the owner's possession, and he was not deprived of their use, his agent having bid in the sheep at the sale for the amount of the unpaid taxes, making payment with the owner's personal check, there was no conversion of the sheep; the transaction, at most, amounting only to a payment under protest. (Page 187.)
4. **APPEAL AND ERROR—HARMLESS ERROR—CORRECT VERDICT.** Where a verdict for defendant was the only verdict which could have been rendered, erroneous rulings would not be prejudicial.² (Page 187.)

Appeal from District Court, Sixth District; *Hon. John F. Chidester*, Judge.

Action by William Bown, Jr., against William T. Owens. Judgment for defendant. Plaintiff appeals.

AFFIRMED.

Dilworth Woolley and *J. W. Cherry* for appellant.

William F. Knox for respondent.

STRAUP, O. J.

This is an action for conversion. It is alleged in the complaint that the defendant, on the 3d day of October, 1906, "unlawfully and wrongfully seized and disposed" of 181 head of sheep, the property of the plaintiff and converted them to his own use. In his answer the defendant denied all the material allegations of the complaint, except such as were expressly admitted. He further alleged that during the year 1905 he was the county treasurer of Garfield County, Utah, and that the plaintiff "during the entire year of 1905 was the owner of 10,000 head of stock sheep, which during the entire year of 1905 were in Garfield County;" that the sheep were regularly assessed for taxation for the year 1905 by the assessor of that county; that the taxes were not paid; and that 181 head of the plaintiff's sheep

² *Madsen v. Utah Light & R. Co.*, 36 Utah 528, 105 Pac. 799.

were sold by the defendant for unpaid taxes. The proceedings relating to the assessment of the property, the levy and collection of taxes, the giving of notices, the publication of the delinquent list, and all other matters required by the statute to be done to constitute a proper assessment, levy, and collection of taxes, were all alleged in detail. As a further defense it was alleged by the defendant, among other things, that the 181 head of sheep alleged to have been converted by him "never passed from the possession of the plaintiff, and that said plaintiff is the owner thereof, and that he was in no manner damaged by the sale other than by reason thereof he was required to pay a portion of the taxes due the defendant as treasurer of Garfield County, which had been lawfully assessed and computed" on plaintiff's property in Garfield County; that at the sale an employe of the plaintiff bid in and bought the sheep, and paid for them with the personal check of the plaintiff, and that the sheep so sold were at no time taken from the plaintiff's herd nor from his possession. Plaintiff filed a reply, in which he admitted that he was the owner of 8000 head of sheep during the year 1905. He, however, alleged that he, during that year, was a resident of Wayne County, and that in that year all his sheep grazed a portion of the time in that county, and that none of them grazed exclusively in Garfield County, and that for the year 1905 he was regularly and lawfully assessed by the assessor of Wayne County for 8000 head of sheep, and that he paid and discharged the taxes thereon to the treasurer of that county, that the assessor of Garfield County had no authority or jurisdiction to assess the sheep in Garfield County, and that the defendant as treasurer of Garfield County had no authority or jurisdiction to sell the sheep for unpaid taxes. The case was tried to the court and a jury. A verdict was rendered for the defendant, "no cause of action." Plaintiff appeals. He makes fifty-four assignments of error. It is unnecessary to refer to all of them.

Upon the issues, and at the commencement of the trial, the court ruled that the burden of proceeding rested upon

the defendant. The evidence adduced by him was sufficient to show the following facts: The plaintiff was a resident of Sanpete County, where his wife and unmarried children resided, and where he maintained his home. The plaintiff had from 13,000 to 15,000 head of sheep, some of which were kept and grazed by him in Wayne County, some in Garfield County. About the 10th or 12th of February, 1905, the assessor of Garfield County called on the plaintiff and furnished him a blank "statement of property taxable in Garfield County, Utah, for the year 1905, belonging to, in the possession of, or under the control of" the plaintiff. At that time the assessor stated to the plaintiff that he (plaintiff) had in the neighborhood of 15,000 head of sheep in Garfield County, which were subject to taxation in that county. The plaintiff replied that one of his herds, about 3000 head, was north of the North Henry Mountains, which he thought was not in Garfield County. The assessor insisted that the plaintiff be assessed for 10,000 head of sheep. The plaintiff replied that he would not sign the statement for that number, but that he would sign it for 8000 head. After some controversy between them the assessor finally told plaintiff that he would accept the statement of 8000 head, with the understanding that he (the assessor) would report the matter to the county commissioners of Garfield County for their consideration and action. In this connection the assessor testified that the plaintiff at that time said to him that "he (plaintiff) had 8000 head of sheep in this (Garfield) County, that he run in this county exclusively; that he had that many sheep running in our county, and that he was willing to sign the statement for that number of sheep to be assessed in our county." Thereupon the plaintiff signed the statement so furnished him by the assessor, in which he stated that he had 8000 head of sheep and ten mules "taxable in Garfield County," and that "the above list contains a full and correct statement of all property" owned by him, or under his control, subject to taxation in that county. That statement so signed by the plaintiff was produced, identified, and admitted in evidence.

Thereafter the county commissioners, sitting as a board of equalization, upon due notice to the plaintiff, raised the number of sheep from 8000 to 10,000 head. The total value of the property assessed against the plaintiff in that county—10,000 head of sheep and ten mules—was \$20,150.00. The taxes thereon amounted to \$704.80. Thereafter, and after the taxes became due, and while the delinquent list of unpaid taxes was being published, the plaintiff met with the county commissioners of Garfield County to consider the amount of taxes that should be paid by him. The plaintiff then claimed and asserted to the board that he had but 13,000 head of sheep; that he had been assessed and taxed in Wayne County for 8000 head; that 5000 head of sheep were all the sheep that he had in Garfield County, and which had “run exclusively in that county, and that he kept 5,000 head in that county all the time,” and that he would pay taxes to Garfield County on 5000 head. He further asserted to the board that the 8000 head of sheep which were assessed against him in Wayne County were grazed a portion of the time in Garfield County, and that the latter county would be entitled to its just proportion of the taxes, which would be paid by him to the treasurer of Wayne County on the 8000 head of sheep, and in that way Garfield County would get its proper tax for 10,000 head of sheep which that county had assessed against him.

There is a statute which provides that where transient stock is assessed in one county, but which grazed a part of the fiscal year in another county, such other county is entitled “to such portion of the tax paid on said transient herd as the time in which said transient herd grazed in such county bears to the amount of tax paid.” (Section 2542xl, Comp. Laws 1907.) The commissioners called plaintiff’s attention to his failure to apply for and file a grazing certificate, as was by law in such case required. (Sections 2539, 2542, Comp. Laws 1907.) The plaintiff thereupon stated that such a certificate would be filed by him showing the number of sheep that were grazed by him in Garfield County, and which were assessed in Wayne County, and again

stated that he would pay Garfield County the taxes on 5000 head of sheep, which he admitted had been in that county all the time during the fiscal year 1905. Thereupon the commissioners of Garfield County remitted one-half of the tax, and, in accordance with plaintiff's suggestion and promise, required him to pay taxes on only 5000 head of sheep, or the sum of \$352.40. The plaintiff filed his grazing certificate, in which it appeared that of the 8000 head of sheep assessed against him in Wayne County, 7300 head had grazed in Garfield County four months of that year. The plaintiff, however, refused and failed to pay any part of the taxes on the 5000 head of sheep which he had admitted were exclusively grazed in Garfield County, and which were within that county during the entire fiscal year. He also failed and refused to pay any portion of the taxes to Wayne County which were assessed against him in that county on the 8,000 head of sheep. The treasurer of Wayne County, however, collected that tax by sale of some of plaintiff's property, and paid to Garfield County the portion of that tax due to it, which amounted to \$24.33. The \$352.40 taxes due Garfield County on the 5000 head of sheep, remaining unpaid, and the plaintiff having no real estate in that county, the county treasurer of that county, on the 3d day of October, 1906, sold 181 head of plaintiff's sheep in satisfaction of the unpaid taxes of \$352.40. Considerable evidence was given in behalf of the defendant, in addition to the plaintiff's admissions, that the plaintiff in the year 1905 was the owner of from 15,000 to 18,000 head of sheep.

The defendant called a witness, and asked him whether Frank Durfee, who bid in the sheep at the sale, was an employe of the plaintiff. Thereupon counsel for plaintiff objected to the question upon the ground that it was immaterial. Without any ruling of the court counsel for the defendant then stated: "I propose to prove by this witness the allegations of our answer in regard to Frank Durfee being in the employ of the plaintiff as a herder, and that Durfee paid for the sheep with the check of the plaintiff, and that the sheep sold were never taken out of the herd,

and that the only damage sustained by the plaintiff was the amount of the check paid to the defendant as alleged in the answer." In reply to that counsel for plaintiff said: "We admit that." The defendant also put in evidence the proceedings had in assessing the property against the plaintiff in Garfield County, and in levying and collecting the taxes, none of which are questioned, except that the delinquent tax list, as now claimed by the appellant, was not published according to law, and that the contents of the notice sent to the plaintiff by the assessor, showing the property and amount of taxes assessed against him, were not shown by the best evidence.

When the defendant rested, the plaintiff moved the court to direct a verdict in his favor on the grounds: "First, that the evidence of the defendant fails to show any legal justification for the seizure and sale of this property as a matter of law; second, and if it is all true, as it has been considered in this motion, it is insufficient and inadequate to make up any legal justification for his acts as pleaded and admitted in the pleadings in this case." The motion was overruled. The plaintiff thereupon gave evidence tending to show, among other things, that he was a resident of Wayne County since the year 1903, and that in the year 1905 he had sheep running in both Wayne and Garfield counties; that he had "no sheep in the year 1905 that grazed exclusively in Garfield County." He admitted signing the statement given to the assessor of Garfield County, in which he stated that he had 8000 head of sheep "taxable in Garfield County," but testified that he gave such statement to the assessor with the understanding that the assessor of Garfield County was to transmit the statement to the assessor of Wayne County (which was denied by the assessor), and that on the back of the statement was indorsed his name and the word "Notam," which is the name of a little village in Wayne County, as his place of residence, and that the word "Notam" was subsequently erased by some person unknown to him. He denied the statements made to the assessor of Garfield County, and to the commissioners of that

county, with respect to the number of sheep exclusively grazed by him in that county during the year 1905, or which were otherwise in that county during all of that year. At the conclusion of all the evidence the plaintiff again requested the court to direct a verdict in his favor. The court declined to do so, and submitted the case to the jury.

Among other things, the court charged the jury that if they found that the plaintiff was a resident of Sanpete County, and that during the year 1905 he had 5000 head of sheep ranging in Garfield County which were assessed in that county while so ranging therein, they should find for the defendant. If, on the other hand, the jury found that the plaintiff was a resident of Wayne County, and that the sheep in question ranged a part of the time in Wayne County, and a part of the time in Garfield County, for the year 1905, then they should find for the plaintiff. And if the jury further found that the plaintiff owned and grazed 5000 head of sheep in Garfield County "the entire year of 1905, and that said sheep were not grazed in that year in Wayne County," then they should find for the defendant. This instruction is assailed, and it is also urged that a verdict ought to have been directed for the plaintiff, on the ground that the evidence conclusively shows that the plaintiff was a resident of Wayne County. The evidence relating to the plaintiff's place of residence during the year 1905 was conflicting. There is, however, ample evidence in the record to justify a finding that the plaintiff was then, and for many years prior thereto had been, a resident of Sanpete County, and not of Wayne County. Complaint is also made of the portion of this charge wherein the court directed the jury to find for the defendant if they found that the plaintiff owned and grazed 5000 head of sheep in Garfield County, for the entire year of 1905, and that none of said sheep grazed any portion of the time in Wayne County for that year, because the court did not, in that connection, also instruct the jury, in respect of the things required by the statute to be done, to make a lawful assessment, and levy and collection of the tax, and that it was essential for them

to find that the law in such particulars had been complied with, before they could properly render a verdict for the defendant. There would be much force to the contention had the plaintiff requested such an instruction, and had the court refused to give it, and had not the plaintiff himself, by his reply, and upon the theory of the case as he presented it by his evidence, and by his requests, himself made the result of the case depend upon the question whether the plaintiff was a resident of Wayne County, whether he had 5,000 head of sheep in Garfield County which did not range in Wayne County part of the time, and whether the sheep ranged by him in Garfield County were there subject to taxation. The principal thing contended for by the plaintiff in the court below was that the assessor of Garfield County had no authority to assess the sheep because the plaintiff was a resident of Wayne County, and that he ranged his sheep during the year 1905 part of the time in Wayne County and part of the time in Garfield County, and for that reason the sheep, under the provisions of section 6, c. 105, Laws Utah, 1901, were subject to taxation only in Wayne County, and could not lawfully be assessed by the assessor of Garfield County. That section provides 1 that the taxes of all live stock owned by residents of the state, and driven from one county to another, for the purpose of being grazed, and which grazed for any portion of the year in the county where owned, should be paid in the county where owned. Because of such provision, and of the claim made by the plaintiff, the court instructed the jury to find for the plaintiff if they found he was a resident of Wayne County, and if the sheep assessed in Garfield County were grazed any portion of the year 1905 in Wayne County, but to find for the defendant if the plaintiff was not a resident of Wayne County, or if the 5,000 head of sheep assessed in Garfield County grazed the entire year of 1905 in that county, and grazed no part of that year in Wayne County. For these reasons we think the complaint made of the charge is not well founded.

Other complaints are made of the charge, not so much that the jury were given wrong principles of law, but principally because the charge was not applicable to the pleadings and to the evidence. We do not think the charge is open to such objections.

It is further urged that the evidence was insufficient to show that the delinquent tax list was published according to law, and for that reason it is now urged, in this court, that the court below erred in refusing to direct a verdict for the plaintiff. It is to be observed that the plaintiff in the court below did not base his motion for a directed verdict on any such ground. The motion was based on the general ground "that the evidence of the defendant fails to show any legal justification for the seizure and sale of this property," and "is insufficient and inadequate to make up any legal justification for his acts as pleaded and admitted in the pleadings." The difficulty with appellant is that in the court below he challenged the sale of the sheep on the ground, and tried his case on the theory, that the sheep were not taxable in Garfield County, but were taxable only in Wayne County. The fair import of the motion, if it can be said that it specifies anything, is in harmony with such theory. It certainly cannot be said that such a motion either advised the court or opposing counsel that a verdict was asked to be directed on the ground of the insufficiency of the evidence to show a proper publication of the tax list, or other regularities of the proceedings in levying and collecting the tax. It is now settled in this jurisdiction that a party cannot impute error to the ruling of the trial court, refusing to direct a verdict on a presented motion, in which the grounds for the direction of the verdict are not specified, nor upon grounds which 2
were not specified in the court below, unless the defect was incurable, and the party against whom the motion was directed was in no event entitled to recover or prevail. (*Smalley v. Railroad*, 34 Utah, 423, 98 Pac. 311.)

Lastly, none of the rulings complained of were prejudicial to the plaintiff because of the admission made in open

court in the progress of the trial. This is not a suit to recover money paid under protest, or paid involuntarily. It is one for an unlawful and wrongful seizure and conversion of sheep, the property of the plaintiff. When the plaintiff admitted that the 181 head of sheep alleged to have been converted by the defendant were not taken out of plaintiff's herd, as was alleged in the defendant's answer, and offered to be proved, but at all times remained in his possession, and that at the sale plaintiff's employe bid in the sheep for the amount of the unpaid taxes, and made such payment with the personal check of the plaintiff, and that the sheep thereafter continued to remain in plaintiff's possession as though no sale had been had, we think he admitted himself out of court on his alleged cause of action for a conversion. It being made to appear that the sheep were not taken from the plaintiff's possession, that he was not in any manner deprived of their use, and that his actual dominion over them was not interfered with, we think his cause of action for a conversion wholly failed. The verdict of the jury being, therefore, the only verdict which properly could have been rendered in the case, the rulings complained of, even though erroneous, did not prejudice the plaintiff. (*Madsen v. Utah Light & R. Co.*, 36 Utah, 528, 105 Pac. 799.) True, it may be said that had not the plaintiff bid in and purchased the sheep at such pretended sale, they would have been sold to another, who, by reason of such sale and purchase, might have taken possession of them, or might have attempted to do so, and in that way plaintiff's possession of, or dominion over, the sheep would have been interfered with. Evidently, to prevent just such a thing, and to prevent the taking of the sheep from him, and his dominion over them from being interfered with, he bought them, or, caused them to be bought for him, at such pretended sale. In other words, the defendant, as treasurer of Garfield County, for unpaid taxes sold to the plaintiff plaintiff's sheep, which at no time were taken from him. And to prevent them from being taken from him, he bought them by paying the treasurer the unpaid taxes. The

transaction at most amounted only to a payment under protest, or an involuntary payment, but not to a conversion.

Let the judgment of the court below, be affirmed, with costs. Such is the order.

FRICK and McCARTY, JJ., concur.

ELDREDGE v. SALT LAKE COUNTY.

No. 2101. Decided January 17, 1910 (106 Pac. 939).

1. **ALIENS—NATURALIZATION—JURISDICTION—OF STATE COURTS—NATURE OF AUTHORITY EXERCISED.** The federal government in authorizing state courts to act in naturalization proceedings selects such courts and the clerks thereof as government agencies through whom the government is discharging a function of sovereignty; and while Congress may confer power on the state courts to act in naturalization proceedings and the state courts may constitutionally exercise the same when authorized so to do, Congress may not make their acts in that regard a part of their duties as state courts, and the power conferred and the duties imposed by the naturalization act (Act Cong. June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. 1909, p. 97]), are not *ex officio* powers and duties belonging to and devolving on a state office as such. (Page 193.)
2. **STATES—OFFICERS—DUTIES.** The state within its sphere may impose any duty it sees fit on an office it has the power to create, so long as the duties come within its sovereign power, but the state may not without the consent of the federal government empower any state officer to discharge functions belonging exclusively to the federal government. (Page 193.)
3. **CLERKS OF COURTS—ACCOUNTING FOR FEES IN NATURALIZATION PROCEEDINGS.** The duties which the clerk of a state district court discharges and the services which he renders in naturalization proceedings under the naturalization act (Act Cong. June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. 1909, p. 97]) are not duties imposed on nor services forming a part of the office, and the salary received as compensation therefor does not constitute compensation for extra official services, and he need not account therefor to his county, notwithstanding Const. art. 21, secs. 1, 2, providing that officers shall be paid fixed salaries, and Comp. Laws 1907, secs. 2057, 2062, fixing the salary of the clerk which shall constitute full compensation. (Page 194.)

4. **CLERKS OF COURTS—COMPENSATION—LIMITATION OF EMOLUMENTS—FEES IN NATURALIZATION PROCEEDINGS.** The principle that the incumbent of a public office must discharge duties imposed on the office for the compensation fixed by law, and, where additional duties are imposed without additional compensation, he must discharge such duties for the compensation fixed by law, does not prevent the clerk of a state district court who performs services in naturalization proceedings under the naturalization act (Act Cong. June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. p. 97]) from retaining the fees as provided by the act. (Page 194.)

Appeal from District Court, Third District; *Hon. C. W. Morse*, Judge.

Action by J. U. Eldredge, Jr., against Salt Lake County.

Judgment for defendant. Plaintiff appeals.

REVERSED AND REMANDED WITH DIRECTIONS.

John M. Zane and *Willard Hansen* for appellant.

P. T. Farnsworth, Jr., for respondent.

FRICK, J.

This case was submitted to the district court upon an agreed statement of facts, substantially as follows: That the appellant is, and at all times since January 1, 1907, has been, the duly elected, qualified, and acting clerk of the district court of Salt Lake County, Utah. That pursuant to the provisions of Act Cong. June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1909, p. 97), entitled "An act to establish a bureau of immigration and naturalization and to provide for a uniform rule for the naturalization of aliens throughout the United States," the appellant has collected from the applicants for citizenship the fees provided by said act to be collected by him, and that he has accounted for one-half of the fees so collected by him as provided by said act, but that he has retained and now has in his possession the remaining one-half of said fees, amounting to the sum of \$632. That the services for which said fees

were collected were performed by virtue of the act aforesaid. That in performing said services no additional assistance or help was required or employed in the office of said district clerk, and the defendant county has not been under any additional expense by reason of the performance of said services by appellant for which the fees in question were collected by him.

Under the laws of this state appellant discharges the duties of clerk of the district court of Salt Lake County as the county clerk of said county. The laws applicable to county clerks are therefore applicable to appellant. By section 1 of article 21 of the Constitution of this state it is, among other things, provided that "all city, district, state, county, town, and school officers . . . shall be paid fixed and definite salaries." By the section following the foregoing it is, in substance, provided that the Legislature shall by law provide the fees which shall be collected by the officers referred to in the preceding section, and that all such officers "shall be required by law to keep a true and correct account of all fees collected by them, and to pay the same into the proper treasury, and the officer whose duty it is to collect such fees shall be held responsible on his bond for the same." Pursuant to the foregoing provisions, the Legislature, from time to time, has passed certain acts in which the fees for the services rendered by the different officers mentioned in the Constitution, including appellant, are fixed. The law also provides that the fees collected by the county officers, including appellant, shall be paid into the county treasury monthly. Among other fees provided for by the section of the statute which applies to appellant, and which he, before the act of Congress aforesaid was in force, was required to collect and account for, are the following items: "For declaration of intention to become a citizen of the United States, two dollars; for final citizenship certificate, three dollars." By section 2057, Comp. Laws 1907, the maximum amount of what appellant's salary may be fixed, and by section 2062 the

salary allowed constitutes full compensation for all official services rendered by appellant.

Up to the year 1906 the naturalization laws of the United States were found in the different acts of Congress, commencing with the act passed in the year 1802 (Act April 14, 1802, chap. 28, 2 Stat. 153). This act was amended from time to time, as appears from title 30 of the Revised Statutes of the United States, which title comprises sections 2165 to 2174, inclusive (U. S. Comp. St. 1901, pp. 1329-1334), and was entitled, "Naturalization." These naturalization laws are also found in Rev. St., Utah 1898, pp. 87-90. It was by the act of 1802, that Congress first conferred the authority upon state courts to admit qualified aliens to citizenship. It seems that up to 1906, the naturalization laws were neither rigorous nor very explicit, and during all of the time from 1802 to 1906 Congress had left it to the several states to determine and fix the fees that the state or county officers should be permitted to collect for the services rendered by them in hearing and passing on application for and in making a record of the proceedings by which qualified aliens were admitted to citizenship. The matter of fixing, collecting, and accounting for fees accruing in said courts was thus a matter with which Congress did not concern itself until the passage of the act of June 29, 1906, known as the present naturalization act. This act is set forth in full in the Compiled Laws of Utah of 1907, at pages 114 to 130, inclusive. That act is the only comprehensive law ever enacted by Congress upon the subject of naturalization in which the entire procedure is provided, and in which provision for the collection of fees is made, and the manner of accounting for them is provided for. In section 3 of that act jurisdiction to naturalize aliens is conferred on all the Federal courts, and also upon "courts of record in any state . . . having a seal, a clerk, and jurisdictions of action at law or equity . . . in which the amount in controversy is unlimited." In section 13 of the act the clerk of each court is required to "charge, collect, and account" for fees as follows: For receiving and

filing declaration of intention, one dollar; for filing and docketing petition, two dollars; for entering final order and issuing certificate to applicant, two dollars. The statute further provides that "the clerk of any court collecting such fees is hereby authorized to retain one-half of the fees collected by him in such naturalization proceeding; the remaining one-half of the naturalization fees in each case collected by such clerks respectively, shall be accounted for in their quarterly accounts, which they are hereby required to render the bureau of immigration and naturalization, and paid over to said bureau within thirty days from the close of each quarter in each and every fiscal year." It is also provided that the money paid by the clerks aforesaid shall be deposited in the treasury of the United States. It is further provided that, when the fees collected by any clerk exceed the sum of three thousand dollars in any one year, then such clerk must account for and pay over all the fees in excess of said amount, and each clerk must also provide for and pay out of the fees collected by him all additional clerical help that may be required in performing the duties imposed by the act, but, in case any clerk collects fees exceeding the sum of six thousand dollars, then he may be allowed the cost of the additional clerical help that may be required. The act also provides penalties for the refusal of any clerk to comply with its provisions, or for failing to account, or for a violation of any of the provisions of the act.

Upon the facts and the laws as above outlined, the district court found in favor of respondent county, and entered judgment requiring appellant to account for said sum of six hundred and thirty-two dollars received by him as fees in naturalization proceedings. Appellant presents the record to this court for review on appeal.

The only question, in view of the record, to be determined is whether appellant, as *ex officio* clerk of the district court of Salt Lake County, should be required to account to said county for the fees collected by him in naturalization proceedings. Stating it in another form, does appellant receive such fees by virtue of his office, so that the

salary he receives constitutes payment for the services by him rendered in such proceedings? It seems to us too obvious to require either argument of the citation of authorities that in naturalization proceedings the United States government exercises sovereign functions which exclusively belong to that government, and, further, that, in authorizing the state courts to act in such proceedings, the national government selects such courts and the clerks thereof as government agencies through whom said government 1 is discharging one of its peculiar functions of national sovereignty. Whatever may have been the theory of some courts regarding the power of Congress to confer such authority upon the state courts in the past, the question is now settled that Congress has such power, and that state courts may constitutionally exercise the same when authorized by Congress to do so. Among other cases, we refer to the following: *Levin v. United States*, 128 Fed. 826, 63 C. C. A. 476; *Robertson v. Baldwin*, 165 U. S. 275, 17 Sup. Ct. 326, 41 L. Ed. 715; *State v. Libby*, 47 Wash. 481, 92 Pac. 350.

The question as to whether the state courts continue or cease to be state courts while acting in naturalization cases, while interesting, is not material. It is enough for the present to know that in so doing such courts are merely agencies of the national government. It, however, does not follow that because Congress has the power to authorize appellant to act as an agent of the national government in naturalization proceedings Congress may likewise make his acts in that regard a part of the duties of the office held by him. The office held by him is and can be created by the state alone. The state within its sphere of sovereign power may thus impose any duties it sees fit upon the office it has 2 the power to create so long as the duties it imposes come within its sovereign power. The State, however, cannot, without the consent of the national government, empower any state officer to discharge functions belonging exclusively to the national government. If this be so, then it follows that in creating the office of which appellant is the incumbent

the State, without the consent of Congress, could not confer upon him the authority to discharge any of the duties which are required of him by the act of Congress of June 29, 1906, and under which the fees in question were obtained by him. The power conferred and the duties imposed by said act, therefore, are not such as adhere to the office, or such as are commonly designated as *ex officio* powers and duties belonging to and devolving upon the office as such. As we have seen, Congress, for obvious reasons, has not the power to attach duties to state or county officers as such, although it may have the power to grant to the incumbents of such offices authority to discharge certain powers which are exclusively vested in the national government.

From the foregoing it seems clear to us that the duties which appellant discharged and the services rendered by him by virtue of the act of Congress aforesaid are not duties which are imposed on nor services which are rendered as a part of the county office to which he was elected and of which he was the incumbent during the time in 3 which the fees in question were earned and received by him. If this be so, then the salary which he received as compensation for discharging the duties of such county office was not intended to, and did not, constitute compensation for the extra official services he rendered as an agent of the general government in discharging the powers conferred on him by the act of Congress aforesaid 4 and for which services the fees in question were allowed him by the national, and not by the State, government.

It is conceded by counsel for respondent that the State is powerless to fix or impose fees in naturalization proceedings without the consent of Congress. That this must be so seems clear, because to admit aliens to become citizens is a function belonging exclusively to the national government. But counsel for respondent nevertheless insists that, although the Congress fixed the fees and authorized appellant to retain one-half thereof as compensation for services rendered by him under the congressional act and required him to account to the national government for the other one-half, that not-

withstanding this, respondent is nevertheless entitled to the amount that Congress authorized appellant to retain for his services. This claim is however, based upon the contention that the services rendered by the appellant are rendered as a part of the duties of his office, and that the fees are a part of the emoluments of that office. We have already attempted to show that counsel's contentions in this regard are not sound. Counsel, however, cites concrete cases, which he contends, are decisive of the question in his favor. The case to which counsel refers as a parallel one is *Whittemore v. Seabury*, 23 How. Prac. (N. Y.) 121. That case was decided in 1862, and by the decision the clerk of the city court of Brooklyn was required to account for fees collected by him in naturalization cases. At that time, however, as we have pointed out, Congress permitted the states to fix and collect the fees in naturalization cases which were conducted in the state courts. The whole question of what the fees should be, and how collected and accounted for, was thus left to the states. The whole matter being thus within the power of the states, they no doubt could determine what should be done with the fees they had the power to and did impose. We have seen, however, that Congress has deprived the states of the power to impose fees in naturalization cases and with it went the power to dispose of them. In view, therefore, of the changed conditions, and for the reasons hereinbefore stated, the case last referred to is in our judgment not an authority.

The case of *Finley v. Territory*, 12 Okl. 621, 73 Pac. 273, is also relied on by respondent. In that case the office in question was a territorial office. By an act of Congress certain duties were imposed upon the incumbents of certain offices for which certain fees were provided by the act. Under the laws of the territory of Oklahoma, the officers were paid salaries for official services rendered. One of those officers, a probate judge, performed the duties imposed by the congressional act aforesaid, and claimed the fees allowed by the act as compensation, in addition to his official salary. It was held that the duties imposed by the act of Congress

were a part of the duties of the office of probate judge, and were compensated for by the salary paid to the judge. In classifying that case, it must be kept in mind that the territorial offices, as well as incumbents thereof, were always under the paramount control of Congress. In the very act under consideration in that case Congress expressly ratified the acts of the territorial Legislature with regard to the powers and duties that had been imposed on the office of probate judge and on the judge himself, and, after such ratification, also made it the duty of probate judges to perform the services required by the act. It was held that the probate judges must account for the fees provided by the act upon the ground that the services rendered under the act were rendered as a part of the duties imposed upon the office, and were compensated by payment of a regular salary. The decision in that case is based upon familiar principles, namely that the incumbent of any public office must discharge the duties imposed upon such office for the compensation fixed by law and if additional duties are imposed upon the office without additional compensation such duties must be discharged for the compensation fixed by law. That principle however does not apply to the case at bar for the reason that Congress has no power to add to the duties of a state or county office and the state with respect to the office in question, when it created it, did not have the power to confer authority upon appellant, or any other clerk, to discharge duties which related to powers which belong exclusively to the national government. We repeat, therefore, that neither the duties imposed nor the services rendered in naturalization proceedings under the act of 1906 were imposed nor rendered as a part of the official duties of appellant as the same were or could be imposed by the State of Utah, who alone had the power to create the office and to fix its duties and emoluments. The services were rendered, not as an agency of the State of Utah, but as an agency of the national government, for which the national government, and not the state, fixed and allowed the compensation. The decision in the case of *Rhea v. Board of Com'rs*, 12 Idaho,

455, 88 Pac. 89, is based entirely upon the authority of *Finley v. Territory*, *supra*. This being so, we need not now inquire whether the Rhea case is sound or not. We have shown that the doctrine on which the Finley Case rests is foreign to the doctrine involved in the case at bar, and, if this be true, then all cases, whether few or many, that are based on the principle decided in the Finley Case, can have no influence on the case at bar.

Under the view we have taken of the questions involved in the case at bar, we do not deem it necessary to discuss further the other cases that are cited by the respective counsel in support of their respective claims and theories. Counsel have not cited nor have we been able to find any case in which the precise question involved in the case at bar has been passed on. We have, therefore, determined the questions involved in accordance with fundamental principles as we understand them.

The judgment of the district court is therefore reversed, and the cause remanded to said court, with directions to enter a judgment upon the facts as stipulated, in favor of the appellant, appellant to recover costs.

STRAUP, C. J., and McCARTY, J., concur.

NEUBERGER v. ROBBINS.

No. 2032. Decided January 19, 1910 (106 Pac. 933).

1. TRIAL—TRIAL BY COURT—ISSUES—FINDINGS. A finding entirely outside of the issues is erroneous and cannot be upheld. (Page 203.)
2. SALES—ACTION FOR UNPAID PRICE—ISSUES—FINDINGS. Where a seller sued for the balance due on a contract on the theory that he had performed the contract binding him to sell and deliver the amount of wheat he then had on hand, and the undisputed evidence showed that he had on hand two thousand one hundred and sixty-three bushels, and that he delivered only one thousand one hundred forty-two and one-half bushels, a finding that the seller had fully performed his part of the contract was unauthorized. (Page 203.)
3. CONTRACTS—STIPULATIONS—WAIVER. A waiver of performance of stipulations of a contract must be pleaded to be available. (Page 203.)

Appeal from District Court, First District; *Hon. W. W. Maughan*, Judge.

Action by F. A. Neuberger against David Robbins, doing business under the firm name of David Robbins & Company.

Judgment for plaintiff. Defendant appeals.

REVERSED, WITH DIRECTIONS TO GRANT A NEW TRIAL.

Nebeker, Hart & Nebeker for appellant.

A. A. Law for respondent.

McCARTY, J.

This appeal is from a judgment rendered in the district court of Cache County, Utah, in favor of plaintiff and for the sum of \$176.73. The facts and circumstances over which the controversy arose are as follows: On or about September 1, 1907, the defendant, who, under the name of David Robbins & Co., at Salt Lake City, Utah, was engaged in business buying and selling farm products, through his agent, M. F. Rigby, contracted with plaintiff and several other parties who were engaged in farming in Box Elder County, Utah, for the purchase of their wheat. Defendant, at the time the contracts were made, paid plaintiff one hundred dollars on the purchase price of the wheat, and received from him the following receipt, which contains the terms and conditions upon which plaintiff agreed to dispose of his wheat to defendant: "September 1, 1907. Received from David Robbins & Company, of Salt Lake City, one hundred dollars in part payment of three thousand bushels number 1 white milling wheat at sixty-four cents per bushel, sacked, to be delivered f. o. b. cars at Kolmer, on October 15, 1907, balance of payment to be made on delivery of said wheat. F. A. Neuberger. (This contract not transferable.)" Immediately after the contracts referred to were entered into, the market price of wheat advanced from sixty-four cents to sixty-eight cents per bushel, and plaintiff became dissatisfied

with the bargain he had made with defendant for the sale of his wheat, and, on September 18th, wrote to Mr. Rigby, defendant's agent, and informed him that neither he, the plaintiff, nor the other farmers who had contracted to sell their grain for sixty-four cents per bushel would deliver it at that price. In the course of the letter, he says: "They are not at all satisfied with the deal, and I myself . . . do not feel contented. . . . I am instructed by them to notify you positively that you cannot have this grain unless you pay them the regular market price. . . . If you want to pay the right and satisfactory price, you can have the grain; if not, the contracts will not be honored and the grain will not be furnished." On September 23d, he wrote direct to the defendant, and, in the course of his letter, stated: "Now, gentlemen, we will just give you this proposition, that if you want our wheat you will pay us as much as others are paying; if not, we cannot accommodate you, and any amounts you have advanced will be promptly returned to you with interest."

Some of the farmers who were interested with plaintiff in the matter were called as witnesses, and denied that they had authorized plaintiff to write to defendant in their behalf. This, however, is unimportant, as they are not parties to the suit. In response to the letters written by plaintiff advising defendant that he would not deliver any wheat for the price specified in the contract, defendant sent his agent, Mr. Rigby, to meet with plaintiff and the other farmers who were dissatisfied with their contracts. Mr. Rigby accordingly met with the parties who were dissatisfied and agreed to pay them sixty-eight cents instead of sixty-four cents per bushel for their wheat. Plaintiff was not present in person, but was represented by his son, J. J. Neuberger, who had charge of the farm upon which the grain in question was raised. There seems to be some conflict in the evidence as to what was said upon that occasion respecting the amount of grain plaintiff should deliver under the new or modified contract. O. J. Norr, a witness for plaintiff, testified in part, as follows: "Mr. Rigby said on account of us not being satisfied

he came out to make other arrangements with us." This testimony is not denied. The witness further testified: "I remarked to Mr. Rigby that . . . I didn't see how we could furnish the amount we agreed upon in the first contract, . . . and he said as far as he was concerned that would not make so much difference, 'just so we get what you have to spare. That is all we look for.'" In answer to the question, "Did you hear Mr. Neuberger say anything with reference to the amount of wheat that he would agree to sell and deliver?" the witness replied: "No, sir; he didn't state any amount." Several other witnesses testified to the same thing with respect to the amount of wheat that was to be delivered. J. J. Neuberger was called as a witness for plaintiff and testified that there were 2163 bushels of wheat raised and threshed on his father's (the plaintiff's) farm in 1907. He was questioned by plaintiff's counsel in reference to the conversation he had with Rigby at the time it is alleged a new contract was entered into for the sale of the wheat raised on plaintiff's farm, and testified as follows: "Q. What was said with reference to the quantity of wheat to be sold and delivered? A. Mr. Rigby asked me how much grain I could deliver, and I told him 2163, and he says all right. Q. What was said by you with reference to the amount that you would sell of your father's wheat? A. I told him I would deliver all I could possibly spare." This and other testimony of similar import was denied by Rigby, who testified that plaintiff sold him 3000 bushels of wheat and that he expected him to deliver that amount. He said: "That was the understanding that I had. I supposed that he was going to thresh 3000 bushels." The record shows that of the 2163 bushels of wheat raised on the farm only 1142½ bushels were delivered by plaintiff under the contract. Defendant paid plaintiff \$600 on the wheat delivered, leaving unpaid a balance of \$176.73 of the contract price. Defendant refused to pay this alleged balance, and plaintiff began this action to recover from defendant \$176.73, with interest thereon from November 1, 1907.

The complaint is in the usual form for breach of contracts of this character. Defendant answered, setting up the terms and conditions of the contract as first entered into between him and plaintiff, and further alleged as a counterclaim "that thereafter plaintiff wilfully refused to deliver said wheat or any part thereof to defendant as agreed; that thereupon, in order to induce plaintiff to comply with said agreement without suit, the said defendant consented to the modification of said agreement by agreeing to give the said plaintiff the sum of sixty-eight cents per bushel instead of sixty-four cents per bushel as per said original agreement." Defendant admits the delivery by plaintiff of $1142\frac{1}{2}$ bushels, but alleges "that plaintiff failed and refused to deliver the balance of said 3000 bushels as per said agreement. . . . That owing to the failure of plaintiff to comply with his said contract and deliver the full quantity of wheat as agreed, defendant was compelled to pay the sum of eighty-three cents per bushel for said deficiency to make up and fulfill his contract" which he entered into for the sale of the wheat to another party, to his damage in the sum of \$278.

Plaintiff filed a reply to defendant's answer and counterclaim and, among other things, alleged: "That at the time when the contract mentioned in defendant's counterclaim was entered into plaintiff had not threshed his grain, and at said time stated that he would probably have 3000 bushels of wheat, and agreed with defendant that he would sell all his wheat to him whatever the quantity might be. . . . That about the 1st day of October, 1907, defendant entered into the contract set forth in plaintiff's complaint, but said contract was not intended as a modification of the former agreement, and was different in all its terms except as to place of delivery of the said wheat and was understood by both parties thereto as an entirely new contract in which plaintiff only agreed to sell the amount of wheat he had on hand at said time."

On these issues the court found as follows: (3) "That on or about the 10th day of October, 1907, plaintiff and de-

fendant agreed upon a modification of the contract made and entered into by them as aforesaid, whereby the plaintiff, by the terms of the said contract as modified and changed, agreed to sell and deliver to the defendant so much of his said crop of wheat as he, the said plaintiff, could spare."

(4) "That plaintiff . . . did, pursuant to the terms of said contract as modified and changed, sell and deliver to defendant, 1142½ bushels of wheat at the place and in the manner as agreed upon as aforesaid and in all respects perform all of the conditions and covenants agreed by him to be performed pursuant to the terms of said contract as modified." Defendant contends that that part of the third finding of fact, wherein the court finds that "plaintiff agreed to sell and deliver to defendant so much of his said crop of wheat as he, the said plaintiff, could spare," is outside of the issues made by the pleadings, and that the fourth finding, wherein it recites that "plaintiff in all respects performed all of the conditions and covenants agreed by him to be performed pursuant to the terms of the said contract as modified," is not only unsupported by, but is contrary to, the evidence.

In his counterclaim defendant pleaded and relied upon the contract as first entered into between himself and plaintiff, which, he alleges, was modified so as to increase the price he was to pay for the plaintiff's grain, but not otherwise. On the other hand, plaintiff, in his reply to defendant's counterclaim, alleged that "an entirely new agreement" was entered into "in which plaintiff only agreed to sell the amount of wheat he actually had on hand at the time." It will thus be seen that the pleadings represented the question, namely, was the contract modified as alleged by defendant, or was a new contract entered into "in which plaintiff agreed to sell the amount of wheat he actually had on hand at said time," as pleaded by plaintiff? Now, the court, instead of making a finding responsive to and within this issue, found that a contract entirely different from either the contract pleaded by plaintiff or that pleaded by defendant had been entered into by the parties. The finding being entirely out-

side of the issues is therefore erroneous and cannot be upheld. Nor can the finding of the court that plaintiff fully performed his part of the contract be upheld. Under 1 the contract pleaded by plaintiff in his reply to defendant's counterclaim, he obligated himself to sell and deliver to defendant the "amount of wheat he actually had on hand," and the undisputed evidence shows that he had on hand at the time he made this alleged new contract 2163 bushels, and it is admitted that he delivered only 1142½ bushels. After the 1142½ bushels were delivered, there was some correspondence had between the parties respecting an alleged balance due plaintiff for his wheat. It is claimed by counsel in his brief, if we correctly under- 2 stand his position, that this correspondence, when considered in connection with other facts, shows that defendant waived performance of the contract as to the amount of wheat to be delivered. Plaintiff's case was not predicated upon any claim or theory of waiver. To the contrary it was predicated upon the theory that he had complied with all the terms of his contract. Waiver was not pleaded, and hence was not an issue in the case. It is therefore unnecessary for us to reproduce or review any of the 3 correspondence mentioned or to further refer to it.

The judgment is reversed, with directions to the lower court to grant a new trial. The costs of this appeal to be taxed against respondent.

STRAUP, C. J., and FRICK, J., concur.

ARNOLD v. POPE, Sheriff.

No. 2064. Decided January 20, 1910 (108 Pac. 351.)

1. **PLEADING—SCOPE OF GENERAL DEMURRER.** A general demurrer reaches only defects of substance. (Page 205.)
2. **EXECUTION—INJUNCTION—NECESSARY PARTIES.** In an action to enjoin the collection of a judgment, the judgment creditor or his legal representative is a necessary party. (Page 206.)
3. **APPEAL AND ERROR—REVIEW—HARMLESS ERROR—SUSTAINING DEMURRER.** While ordinarily the objection that there is a defect of parties must be taken by special demurrer, where the defect appears from the face of the complaint, yet, where the complaint also fails to state a cause of action against the only party to the action, it is not prejudicial error to sustain a general demurrer to the complaint, although a good cause of action is stated against one not a party to the action. (Page 206.)
4. **EXECUTION—RESTRAINING COLLECTION OF JUDGMENT—ACTION AGAINST SHERIFF ALONE.** A judgment debtor seeking to enjoin the collection of a judgment because of insolvency of a judgment creditor, and because he has a valid subsisting judgment against the creditor which is a set-off to the judgment sought to be collected, has no cause of action against the sheriff alone to whom an execution has been given by the judgment creditor. (Page 206.)

Appeal from District Court, Fourth District; *Hon. J. E. Booth*, Judge.

Suit by John H. Arnold against Richard Pope, Sheriff.

Judgment for defendant. Plaintiff appeals.

AFFIRMED.

J. A. Wilson for appellant.

Peter Hansen for respondent.

FRICK, J.

In the complaint it is alleged in substance, that Asenath Chadwick had obtained a judgment against the appellant

and one A. C. Emert for \$221.50, which, at the time of filing the complaint, was in full force as appeared from the records of the district court of Uintah County, Utah; that on a day named said Chadwick caused an execution to be issued on said judgment out of said court and placed the same in the hands of the defendant, as sheriff of said county, with directions that he collect the amount aforesaid, as by said execution commanded; that the plaintiff also has a judgment against the said Asenath Chadwick, in the court aforesaid, for the sum of \$363.67, which is in full force and effect. The complaint contains many other allegations of fact which are unnecessary to state. From all the allegations, however, it is made to appear that said Asenath Chadwick is further indebted to the plaintiff and that she is insolvent, and that therefore the defendant sheriff should be restrained from satisfying said execution, and that the judgment of the plaintiff should be offset against the judgment of said Chadwick. The defendant sheriff appeared and demurred generally to the complaint. Upon a hearing on the demurrer the district court sustained the same, and, the plaintiff electing to stand upon the allegations of his complaint, the court entered judgment dismissing the action. Appellant assigns the ruling of the court as error.

It is not clear upon what ground the court based its ruling, but we assume that the demurrer was sustained upon the ground that the complaint did not state facts sufficient to constitute a cause of action against the defendant sheriff. If the demurrer had been based upon the ground of a defect of parties defendant, it should undoubtedly have been sustained. The demurrer, however, was general, and 1 thus could only reach defects of substance. We are of the opinion, however, that the complaint, in so far as the defendant sheriff was concerned, was defective in matters of substance, as well as in not making the judgment creditor, Asenath Chadwick, a party defendant to the action. The defendant sheriff was the mere instrument or agent of Asenath Chadwick through whom the law required her to act in attempting to collect the amount due upon the exe

cution issued upon her judgment. The plaintiff stated no facts constituting a cause of action against the defendant sheriff. It certainly cannot be contended that, because a complaint states a good cause of action against the real party in interest, it therefore states a good cause of action against another who is made, and who may be, a 2 necessary party defendant to the action. Nor can it be doubted that, in an action by which it is sought to enjoin the collection of a judgment, the judgment creditor, or his legal representative, is a necessary party. We know of no rule of law or practice which authorizes a court to pass upon the legal rights of any person without making him a party to the action or proceeding by which it is attempted to pass upon such rights. While, ordinarily, the objection that there is a defect of parties must be taken by special, and not by general, demurrer, where the defect 3 appears from the face of the complaint, yet there, as in this case, the complaint also fails to state a cause of action against the only party to the action, it cannot constitute prejudicial error to sustain a general demurrer to the complaint, although a good cause of action is stated 4 therein against one not a party to the action. In view, therefore, that the complaint did not state a cause of action against the only defendant to the action, the court did not err in sustaining the general demurrer.

The judgment, therefore, should be, and it accordingly is, affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

TADD v. SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY.

No. 2062. Decided January 21, 1910. (106 Pac. 943).

1. **MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.** In an action by a section hand for injuries received in a box car, from which he was unloading ties piled therein, by the fall of one of the ties on plaintiff's foot, evidence *held* not to show that the method adopted by the foreman of pulling the ties down from the pile with a pick was not reasonably safe. (Page 211.)
2. **MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE—EVIDENCE.** The fact that plaintiff's foreman was vexed and in a hurry, while engaged in pulling down ties from the end of a box car for unloading, did not tend to prove negligence; it not appearing that he used more force than was necessary in pulling down the ties. (Page 211.)
3. **MASTER AND SERVANT—ASSUMPTION OF RISK—OBVIOUS DANGER.** The unloading of ties piled crosswise in one end of a box car requiring no special skill or experience, and the danger of the work being obvious to a section hand doing it, he assumed the risk of injury from ties falling upon him which were pulled down; especially where he admitted that he fully understood the danger when the ties were pulled down. (Page 211.)
4. **MASTER AND SERVANT—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—SERVANT'S APPRECIATION OF DANGER.** In a section hand's action for injuries by cross-ties falling upon him, which were being pulled down from the end of a box car for unloading, evidence *held* to show that plaintiff fully appreciated the danger to which he was exposed in doing the work. (Page 212.)

Appeal from District Court, Fourth District; *Hon. J. E. Booth, Judge.*

Action by Thomas Tadd against the San Pedro, Los Angeles & Salt Lake Railroad Company.

Judgment for plaintiff. Defendant appeals.

REVERSED.

Pennel Cherrington, Dana T. Smith and W. E. Rydalch for appellant.

A. B. Morgan and Powers & Marioneaux for respondent.

McCARTY, J.

Plaintiff brought this suit to recover damages for personal injuries alleged to have been sustained by him through the negligence of defendant. The answer denies the acts of negligence charged in the complaint, and alleges contributory negligence and assumption of risk upon the part of the plaintiff. A trial was had, which resulted in a verdict for the plaintiff in the sum of two thousand dollars. From the judgment entered on the verdict, defendant appeals.

Plaintiff was sworn as a witness in his own behalf and testified in substance: That on the afternoon of May 6, 1907, when he received the injury complained of, he was in the employ of defendant as a section hand, and had been so employed for several years prior thereto; that at about two o'clock on the afternoon in question, after having performed some other duties in the line of his employment, he joined his foreman, a Mr. Garrett, and another section hand by the name of Johns, who were unloading ties from a box car; that the north end of the car was filled to the door with ties, but to the south Garrett and Johns had removed a quantity of ties, leaving about eight feet of clear space in the car; that the ties were piled crosswise of the car, and in tiers eight feet high; that when he entered the car about half of the first tier of ties remaining therein had been removed; that in removing the remainder of this tier, consisting of about six or seven ties, Garrett, with the use of a pick, pulled them down one at a time as plaintiff and Johns shoved them out of the car; that Garrett then stuck his pick in the top of the next tier of ties and pulled them down; that when the ties fell they caught him (plaintiff) across the foot; that he got back into the southeast corner of the car, but could not keep out of the way of the falling ties because of the limited amount of clear space in the car.

On cross-examination plaintiff testified: "After we began unloading the ties it was two or three minutes before I was injured. In the first tier that was pulled down there were six or seven ties. It was only about half a tier. Garrett pulled them down and we threw them out. He stuck the pick in and pulled off the tier and Johns and I shoved them out through the door. Garrett pulled the next tier down with a pick. I knew he was going to do it. I understood that after we got through taking out the half tier of ties, we were to throw out some more after they were pulled down for us. Garrett pulled them down with the pick he used on the others and I got back as far as I could in the end of the car to get out of the way of the ties when they fell, because I knew that when he stuck his pick in and pulled them down they would fall. I got back as far as I could in the car because I was afraid they would hit me. Common sense would tell you why I got back."

Johns was called as a witness and testified in part, as follows: "When Tadd (plaintiff) got in the car there was eight or nine feet of clear space. I told Garrett not to use the pick, but he said he had taken down ties that way and never hurt anyone. I told him I was afraid of those ties coming down on us. I told him he was liable to get hurt. Garrett was in a big rush and hurry, and was vexed. The ties were water-soaked and would weigh one hundred and fifty pounds. We took out a half a tier of ties and then started on another tier. Before pulling them down Garrett said, 'Look out!' and I hollered to Tadd, 'Look out!' and the first thing I knew Tadd was caught. Garrett said 'Stand back boys!' and I got up on the ties (lying lengthwise of the car in the south end thereof), and was looking for the ties to fall, and the old man got back in the corner. It was maybe half a minute that elapsed before the ties fell on Tadd. The next thing I heard the old man groaning in the corner of the car. There was a tie lying on his foot and I threw it off. I remonstrated with Garrett about the way he was pulling the ties down in the presence of Tadd, and told

him it was dangerous. It was the second full tier that was pulled down after Tadd got in the car that fell on him. Both times Garrett warned us to get back."

Garrett was then called as a witness by defendant, and testified, in part, as follows: "The car was thirty-six feet long. The doors were six feet wide. While Tadd was working there the doors were entirely open on both east and west sides. There were six or seven ties in the first tier after Tadd came in. I pulled them down with the pick. . . . After that I went to another tier. . . . We unloaded that tier in the same way, and then pulled down another tier in the same way with the pick. . . . I saw the tie hit Tadd. It hit the floor first and then rolled towards me. I stepped over it and it passed me and on to Tadd's toe. When the ties were pulled down Mr. Johns stood on the end of a tie which was running lengthwise from the south end of the car. There were other ties projecting out and Tadd could have gotten on one of them."

The foregoing is, in substance, the evidence bearing upon the question of defendant's negligence, the alleged contributory negligence of plaintiff, and assumed risk. When the evidence was all in and both parties had rested, defendant asked the court to peremptorily instruct the jury to return a verdict in its favor. The refusal of the court to so instruct the jury is assigned as error.

Appellant contends that it was entitled to a directed verdict: First, on the ground that there was no evidence whatever that tended to show negligence on its part; and, second, that the evidence, without conflict, showed that whatever risks and dangers were involved in the unloading of the ties were open and obvious to plaintiff, and that he thereby assumed them.

The only particulars in which respondent claims that appellant was negligent are: First the way in which the tiers of ties were pulled down by Garrett; and, second, "the unreasonable haste and vexation" with which Garrett pulled them down. The only proof relied upon to show that the method by which the ties were pulled down by Garrett was

negligent was the opinion of Johns, that some other way of unloading them would be less dangerous. This, however, did not prove that the method adopted by appellant was not a reasonably safe one. Nor does the fact that Garrett was vexed and in a hurry tend to prove negligence. It is not claimed, nor does the evidence show, that Garrett, in pulling down the ties with his pick, used any more force than was necessary to bring them to the floor of the car, hence the testimony of Johns that Garrett was vexed and was rushing the work did not prove, nor did it tend to prove, any issue in the case. The evidence, when taken and considered in the light most favorable to respondent, wholly fails to establish negligence on the part of appellant. We are also of the opinion that a verdict should have been directed for appellant on the ground that respondent assumed the risks and dangers to which he was exposed. The unloading of the ties was a work which required no special knowledge, skill, or experience on the part of those engaged in it. And the risks and dangers of the employment were as open and obvious to respondent as they were to appellant, and they were of such a character that any man of ordinary intelligence could not help but appreciate and understand them. And the evidence in this case affirmatively and conclusive shows that respondent understood and fully appreciated the very element of danger that caused his injury. Johns, in the presence of respondent, remonstrated with Garrett about the way in which he was pulling down the ties and told him that it was dangerous, and that he (Garrett) was liable to get hurt. When Garrett was in the act of pulling down the ties he said to respondent and Johns, "Stand back, boys!" and Johns also shouted to respondent to "Look out!" That respondent fully realized and appreciated the danger to which he was exposed is conclusively shown by his own evidence, wherein he said "I got back as far as I could in the end of the car to get out of the way of the ties when they fell, because I knew that when he (Garrett) stuck the pick in and pulled them down they would fall. I got back as far as I could

in the car because I was afraid they would hit me. Common sense would tell you why I got back." According to the facts as thus detailed by himself, respondent, under all the authorities, assumed the very risk and element of danger that caused the injury upon which he bases his right to recover. 4

The judgment is reversed. Costs of this appeal to be taxed against respondent.

STRAUP, C. J., and FRICK, J., concur.

SOWARDS et al. v. MEAGHER et al.

No. 2052. Decided January 22, 1910 (108 Pac. 1112).

1. **EVIDENCE—JUDICIAL NOTICE—ACTS OF CONGRESS.** Judicial notice is taken of an act of Congress restoring Indian reserved lands to the public domain. (Page 216.)
2. **WATERS AND WATER COURSES—PUBLIC WATERS—APPROPRIATION.** The right to use unappropriated waters on the public domain and a right in the land itself are severable; the former not depending upon the latter. (Page 218.)
3. **WATERS AND WATER COURSES—APPROPRIATION—LAWS GOVERNING.** Acquisition of the right to use unappropriated public waters whether on the public domain, within a reservation, or elsewhere, is controlled by the laws and customs of the state in which the water is found. (Page 218.)
4. **WATER AND WATER COURSES—PUBLIC WATERS—RIGHT TO APPROPRIATE.** The right to use waters on the public domain for a beneficial purpose may be acquired by mere appropriation, and the first appropriation takes against the world to the extent of his established appropriation, though at the time of his application to the state engineer he has no present right in the lands bordering the source of supply nor in the lands to be benefited; he being entitled to conduct the water across intervening public land to irrigate lands held by him or others or to dispose of it for a beneficial purpose on lands held or owned by them. (Page 218.)
5. **INDIANS—RESERVATIONS NOT SUBJECT TO PRIVATE APPROPRIATION.** No private rights in the lands of an Indian reservation can be acquired. (Page 219.)

6. **EVIDENCE—JUDICIAL NOTICE—OPENING OF PUBLIC LANDS.** Judicial notice is taken of the opening of an Indian reservation in the state and restoration of the unallotted lands thereof to the public domain, but not that particular tracts thereof have since been occupied, claimed, or possessed. (Page 221.)
7. **WATERS AND WATER COURSES—PUBLIC LANDS—ACQUISITION OF RIGHTS.** Under Comp. Laws, sec. 1288x *et seq.*, prescribing procedure for the appropriation of public water, an inceptive right to use such water upon or within an Indian reservation can be initiated or acquired after issuance of a proclamation restoring the lands to the public domain but before they are subject to entry, if the application be made in good faith to appropriate the water for a beneficial use, and not for speculation or monopoly. (Page 222.)
8. **WATERS AND WATER COURSES—"APPROPRIATION OF WATER"—ESSENTIALS.** To constitute a valid appropriation of water, there must be intent to apply it to a beneficial use, a diversion from the natural channel by a ditch, canal or other structure, and an application of it to a useful industry within a reasonable time; the last-mentioned element being the most essential. (Page 222.)
9. **WATERS AND WATER COURSES—APPLICATION FOR APPROPRIATION—EFFECT.** An application to the state engineer for permission to appropriate public water is merely notice of intent to appropriate, and does not establish an appropriation. (Page 223.)
10. **WATERS AND WATER COURSES—APPROPRIATION—EXTENT OF RIGHTS:** Rights under an appropriation of water are limited to the quantity actually used for a beneficial purpose. (Page 225.)
11. **WATERS AND WATER COURSES—APPROPRIATION—CONFLICTING RIGHTS.** To establish a right to appropriate water, one must rely on the strength of his own right, and not on the weakness of his adversary's. (Page 225.)

Appeal from District Court, Fourth District; *Hon. J. E. Booth*, Judge.

Action by N. G. Sowards and another against N. J. Meagher and others.

Judgment dismissing action. Plaintiffs appeal.

AFFIRMED.

D. W. Moffat and *N. T. Porter* for appellants.

Thurman, Wedgwood & Irvine for respondents.

• STRAUP, C. J.

The appellants, plaintiffs below, filed an application with the state engineer for the appropriation of waters of the East fork of Lake fork of Green river, which has its source in Wasatch County, and flows southwesterly into the Du Chesne river, a tributary of the Green. By reason of such application, they claim to have initiated a right to the use of three hundred second feet of water of such stream for irrigation purposes. Upon a protest filed by the respondents, the defendants below, who also filed applications for an appropriation of the same waters, plaintiffs' application was rejected and the respondents' approved by the state engineer. The plaintiffs then brought this action in the District Court of the Fourth Judicial District against the defendants to adjudicate the questions involved.

In their complaint it is alleged that on and prior to the 28th day of August, 1905, there were three hundred second feet of unappropriated water of the stream, and that on that day, "at the hour of twenty minutes after nine o'clock in the forenoon," they (the plaintiffs) "filed in the office of the state engineer of the State of Utah" their application in writing to appropriate three hundred second feet of water to be used each year from January 1st to December 31st, to be diverted from the Green River system, Wasatch County, at a particularly described point on the East Fork of Lake fork of Green River. In such application the diverting works and channel were described, the purpose of such appropriation stated to be for irrigation, and the lands proposed to be irrigated, consisting of a total area of 33,680 acres, described by reference to legal subdivisions. It is further alleged that the defendant Meagher on the 31st day of July, 1905, and the defendant Jarvis on the 19th day of August, 1905, made applications to appropriate the same water by filing written applications with the state engineer, but that at the time of such filings "all of the said waters applied for" by them "the proposed point of diversion, and the lands proposed to be irrigated, were all a part of, and included in an Indian reservation within the state of Utah

set apart exclusively for the use and occupation of the Indian wards of the federal government, which was reserved from the public domain and under the exclusive control of the United States of America, and that all matters and things pertaining to the appropriation of said water were done upon the Indian reservation so exclusively controlled as herein set forth, and that these plaintiffs filed the first application to appropriate the waters" of the stream in question "after the opening of said reservation." It is further alleged that the rights of the defendants Meagher and Jarvis, acquired by them by reason of their applications, were assigned to the defendant the Dry Gulch Irrigation Company, who in March, 1907, "protested the granting of these plaintiffs' application," which was in June, 1907, rejected by the state engineer on the sole ground that their application "is in conflict with the prior applications" of the defendants Meagher and Jarvis. It is further alleged that the defendants have no right, title, or interest whatsoever in or to any portion of the water applied for by the plaintiffs; that they be required to set forth whatever rights or interests are claimed by them; that such claims be adjudged to be unfounded and of no effect; and that plaintiffs' rights and title in and to the use of the waters be determined, quieted, and confirmed. A general demurrer for want of facts was interposed to this complaint, which was sustained by the trial court. The plaintiffs stood on their complaint and declined to amend. The action was thereupon dismissed. They appeal.

The only question presented for review is the ruling of the court sustaining the demurrer. The statute (Comp. Laws 1907, sec. 1288x et seq.), so far as necessary here to notice, provides that, in order that one may acquire the right to the use of any unappropriated public water, he shall make an application in writing to the state engineer, setting forth, among other things, the nature of the proposed use for which the appropriation is intended, the quantity of water to be used, the time during which it is to be used each year, the name of the stream or source where the water is to be diverted, the nature of the diverting works, the dimensions,

grade, shape, and nature of the proposed diverting channel, and such other facts as will clearly define the full purpose of the proposed appropriation. It further provides that, "if the proposed use is for irrigation, the application shall show, in addition to the above required facts, the legal subdivisions of the land proposed to be irrigated, with the total area thereof, and the character of the soil." It is further provided that, if the application is conformable to the requirements of the statute, the engineer shall receive and record it, and shall publish a notice of the application. At any time within thirty days after the completion of the publication, any person may file with the state engineer a written protest against the granting of the application. It then becomes the duty of the engineer to approve or reject the application. Either party aggrieved may then bring an action in the district court for the purpose of adjudicating the questions involved. It is further provided that, in his indorsement of approval of an application, the state engineer shall require that the actual construction work be commenced within six months from the date of such approval, and that it shall be completed within five years from such date. But the engineer may allow in some cases an extension of time to complete such work, or may limit the applicant to a less period of time. It is further provided that, upon the completion of the work, proof shall be made and maps filed showing the nature and extent of the completed works, the stream or source, and place where the water, and the quantity thereof, is diverted, the character, grade, and dimensions of the diverting channel, and other things showing the diversion and appropriation of the water. Upon such proof a certificate of appropriation is then given the applicant, a copy of which is filed with the state engineer and one with the county recorder of the county where the water is diverted.

It may be judicially noticed, and here stated, that Congress in 1902 ordered the unallotted lands of the Indian reservation referred to in the complaint to be restored to the public domain on the 1st day of August, 1903. That time was extended to October 1, 1904,

and again to March 10, 1905. On March 3, 1905, Congress again extended such time to September 1, 1905, but authorized the President of the United State by proclamation to fix an earlier time. Thereupon the President, on the 14th day of July, 1905, issued a proclamation restoring the unallotted lands of the reservation to the public domain, and declaring such lands open to entry, settlement, and disposition on and after the 28th day of August, 1905. It will be observed that it is alleged in the complaint that the defendants filed their applications with the state engineer for the appropriation of the waters in question on the 31st day of July, and the 19th day of August, 1905, after the proclamation was issued, but before the reservation was actually opened and the unallotted lands restored to the public domain, and were subject to entry, settlement, and disposition. Because of such fact, and of the further allegations in the complaint that "all of said water applied for and the lands proposed to be irrigated" by the defendants "were all a part of and included in" the Indian reservation, it is urged by appellants that no right or title in or to the use of the waters or the lands could then lawfully be acquired or initiated; that the State of Utah could not prior to the 28th day of August exercise any jurisdiction over the waters or the lands of the reservation; that the defendants were mere trespassers, and that their applications were void. But, since the appellants filed their application with the state engineer on the very day that the reservation was opened "at the hour of twenty minutes after nine o'clock in the forenoon" of that day, it is asserted by them that a right in and to the use of the water and also in and to the lands proposed to be irrigated by them could then lawfully be acquired, and that a right in and to the use of the water was initiated and acquired by them by the filing of their application. Upon these premises, it is urged that the engineer erred in rejecting their application and approving the applications of the defendants, and that the court likewise erred in sustaining the demurrer. It is now well settled and recognized that there is a distinction between initiating or acquiring a

right to the use of unappropriated public waters on public domain, and a right or interest in or to the public lands themselves, and that the former is not dependent upon the latter. To initiate and acquire a right in and to the use of unappropriated public water, whether on the public domain or within a reservation or elsewhere, is dependent upon the laws or customs of the state in which such water is found. Property in and to the use of unappropriated waters of a stream or spring, or lake, on the public domain, or within a reservation, may be acquired for a beneficial purpose by mere appropriation, and the first appropriator, to the extent of his appropriation when completed and established, is the owner as against all the world. In order that the appropriator may be entitled to the use of such water, it is not essential that he should have located or taken possession of any tract or parcel of the public domain bordering upon the stream or lake from which the appropriation is made, or that he even have an interest in or to the lands proposed to be irrigated, if such be the beneficial purpose of the appropriation. An appropriation may be made of such water for the irrigation of lands not situated upon or near the stream or lake from which it is taken, and the water may be conducted by means of ditches or channels, or otherwise, across the intervening public lands, to irrigate lands possessed by the appropriator, or others, or he may sell and dispose of the water thus conducted to others to use it for a beneficial purpose on claims or lands possessed or owned by them, or in which they have an interest, and upon which the water may be and is applied for a beneficial purpose. These views are discussed and enlarged upon by Mr. Kinney in his work on Irrigation (chapters 6, 7) and by Mr. Farnham in his work on Waters and Water Rights (volume 3, chap. 22). And it also has been held that a valid water right may be acquired even though there had been no compliance with the statute regulating the appropriation of unappropriated public waters, where the unappropriated water was actually diverted by means of a ditch or canal or other-

wise and applied to a beneficial use before the inception of any adverse statutory claim. (*Murray v. Tingley*, 20 Mont. 260, 50 Pac. 723, and cases there referred to.) We have no doubt that unappropriated public water on a reservation or on the public domain is subject to appropriation, and may be appropriated for a beneficial purpose, though the appropriator has not, when his application is filed with the state engineer, a present right in or to the lands along the stream from which the water is proposed to be diverted, or in or to the lands proposed to be irrigated by him. In this respect the appropriation of unappropriated public water on a reservation and the location of a mining claim or other lands on or within a reservation rest on different foundations, and are controlled by different principles. The one is a proper subject of rightful acquisition. The other is not. An appropriation made of such waters will be protected, even as against the government of the United States.

The location of mining claims or the taking up of 5
lands on or within a reservation is void and of no effect, because the ores or lands sought to be taken, or acquired, are not then subject to private ownership or acquisition.

But the serious question in the case, and one not altogether free of doubt, is whether, to initiate a right in the use of unappropriated public water, it is essential, when the notice of intention to appropriate is given, or when, as required by the statute, a written application is made and filed with the state engineer, that the beneficial purpose or use for which the water is proposed to be appropriated shall be immediate and then existing, or whether the beneficial use may be contemplated or anticipated in the future. That is to say, when in an application filed to appropriate water in which the applicant is required, as by the statute provided, to set forth "the nature of the proposed use for which the appropriation is intended," the quantity of water to be used, etc., and such other facts as will clearly define the full purpose of the proposed appropriation, and, if the proposed use is for irrigation, in addition thereto, "the lands pro-

posed to be irrigated, with the total area thereof," the question is, in order to properly initiate a right to the use of the water, whether "the lands proposed to be irrigated" must, when the application is made, be then subject to such a use and capable of being devoted to such a purpose, not necessarily by the applicant himself, but by some one. When the defendants made their applications to appropriate the waters for the purpose of irrigation, no one could then lawfully enter upon, occupy, possess, cultivate, farm, or otherwise use "the lands proposed to be irrigated," because they then were a part of, and included in, the reservation, and were then not open to entry, settlement, or disposition. Neither the applicants nor any one else could then lawfully use water on such lands. No present right permitting any one to make use of the beneficial purpose for which the proposed appropriation was made then existed. The inceptive right initiated by the defendants in and to the use of the water by the filing of their applications depended upon several contingencies: One, upon the actual opening of the reservation for settlement; another, upon the entering upon, or settlement of, or taking up of, some or all of the lands proposed to be irrigated by some one entitled to enter upon such lands, or to take them up, after the reservation was opened; and, still another, the agreement or consent of such persons to take and use the water on such lands, or otherwise to permit them to be irrigated therewith, or the water to be used thereon for the purposes of the proposed appropriation. Should any one of these contingencies fail, the proposed appropriation itself would prove abortive, because the application of the water to the proposed beneficial purpose—the absolute and indispensable essential to constitute a completed valid appropriation—could not be made in such case. In this respect the appellants, however, do not stand on much better ground than do the respondents. The only difference between the parties is this: It is alleged that the respondents made applications to appropriate the water in question to irrigate lands then alleged to be a part of the reservation, the appellants to irrigate lands then a part of

the public domain. In neither instance is it alleged that any portion of the lands proposed to be irrigated had then been entered upon, or taken up, or occupied, or possessed, or claimed, by any one; or that the lands were then, or since have become, subject to such a use. So far as anything is made to appear to the contrary, the lands proposed to be irrigated by the appellants were, when their application was filed, "at the hour of twenty minutes after nine o'clock in the forenoon" on the very day upon which the reservation was opened, and still are, a part of the public domain, unentered, unoccupied, unsettled, and unclaimed. It is alleged, and we may judicially notice, when the reservation was opened and the unallotted 6 lands thereof restored to the public domain; but it is not alleged, nor can we judicially know, that the particular lands proposed to be irrigated were when the appellants filed their application, or since have been, occupied, claimed, or possessed by any one.

So far, then, as made to appear by the complaint, it is shown that, when the applications to appropriate the water were filed, the beneficial use for which the water was proposed to be appropriated did not then exist, but was, by both parties, contemplated and anticipated in the future. That is, we may well assume that, when the applications were filed, both parties contemplated and anticipated that within the time fixed by the engineer for the construction of the works and the diversion of the water, and by the time such works were completed, the water diverted and conducted upon "the lands proposed to be irrigated," such lands would then be claimed, occupied, and possessed by some one entitled to claim and occupy them, and thus the water could, and would, be applied to the beneficial purpose of the proposed appropriation stated in the applications. May an application be made to appropriate water for a beneficial purpose so contemplated in the future? We confess that the question is open to debate, and is not free of doubt. We have, however, with some hesitancy, reached the conclusion that such an application may properly be made when it

is made in good faith and with an actual bona fide intention and a present design to appropriate the water for a beneficial use, though contemplated in the future, and when it is not made for the purposes of mere speculation or monopoly. That the applications were made by the respondents with an actual bona fide intention to appropriate the water for a beneficial purpose is not questioned, nor are their good intentions assailed in any other particular, except by the claim made that they could not lawfully initiate or acquire any right in and to the use of the water until the reservation was actually opened. The three principal elements to constitute a valid appropriation of water, and, as stated by the court in the case of *Low v. Rizer*, 25 Or. 557, 37 Pac. 82, and approved by the same court in the case of the *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 45 Pac. 472, 60 Am. St. Rep. 777, are: "(1) An intent to apply it to some beneficial use; (2) a diversion from the natural channel by means of a ditch, canal, or other structure; and (3) an application of it within a reasonable time to some useful industry." Says Mr. Kinney, in his work on Irrigation (section 151): "There must be, first some actual beneficial purpose existing at the time, or contemplated in the future, as the object for which the appropriator is to use the water." The same doctrine is also stated in Black's Pomeroy on Water Rights, section 48. In *Nevada Ditch Co. v. Bennett*, *supra*, it was said:

"The general purpose of an appropriation is to utilize the water in the arid regions, where the supply is limited, for the development and advancement of beneficial industries. In many localities where the water is difficult of diversion, and the expense considerable in conducting it to the place of use, if individual landholders, or even an aggregation of them, were required to make the appropriation for use upon their own possession, these general purposes would be entirely defeated simply for the reason that such holders could not bear the burden of making the appropriation. In such cases, other persons possessing capital are often willing to make the diversion for the benefit of those who have use for the water, but, unless they may contemplate a use which may be applied by the landowner to his possessions, they could not even initiate the appropriation until they had possessed themselves of lands in proportion to the amount of water it is desired to appropriate; so

that if the user must be the appropriator, and the appropriator the landholder, the arid regions in many places would remain arid, whereas otherwise they could be made to teem with fertility. No sufficient reason has been suggested why the contemplated use may not be for and upon the possessions of a person other than the appropriator. The authorities we have seem to support the rule that it can be, and we believe it is, correct upon principle. We take it, therefore, that the *bona fide* intention which is required of the appropriator to apply the water to some useful purpose may comprehend a use to be made by or through another person, and upon lands and possessions other than those of the appropriator. Thus the appropriator is enabled to complete and finally establish his appropriation through the agency of the user."

Of course, we are not unmindful that what was said by these writers and courts was with respect to appropriations not regulated by statute. But we think the filing of a written application with the state engineer, as required by the statute, is but declaring, or the giving of a notice of, an intention to appropriate unappropriated public water. The final step, and the most essential element, to constitute a completed valid appropriation of water, is the application of it to a beneficial purpose. Whatever else is required to be or is done, until the actual application of the water is made for a beneficial purpose, no valid appropriation has been effected. This was so before the statute, and it is still so under the statute. The filing of the application with the state engineer, as required by the statute, does not establish an appropriation of water. It but takes 9 the place of, and is, the preliminary notice of intention to appropriate. Unless the construction of the works are commenced and completed within the time allowed by the engineer, and the water diverted and applied to the beneficial purpose of the proposed appropriation, the filing of the application is for naught, and no completed valid appropriation has been made. If, therefore, an application is made with a present design and an actual *bona fide* intention to appropriate unappropriated public waters for the irrigation of certain designated lands, a beneficial purpose, at a time when the applicant has no present right, title, or interest in or to the lands proposed to be irrigated there-

with, and, too, when such lands are then unoccupied and unclaimed and a part of a reservation, but it fairly is made to appear that when the proposed diverting channels and work prosecuted with reasonable diligence and dispatch are completed within the time fixed by the statute, or allowed by the engineer, the lands may then be lawfully claimed and occupied, and the water applied to the beneficial purpose for which the appropriation is proposed, we see no good reason why the application should not be received and the applicant protected in his inceptive right. One filing an application under such circumstances, commencing the construction of the works within six months from the approval of his application, prosecuting such proposed works to a completion within the time fixed by the statute or allowed by the engineer, and incurring the necessary expense to divert and conduct the water to the lands proposed to be irrigated, takes the risk that when such works are so completed, and the water diverted and conducted to such lands, they may then be lawfully claimed and occupied by some one who is willing to take the water and use it and apply it to the beneficial purpose for which the application was made to appropriate it. Bearing in mind that an appropriation of the waters as here proposed by the applicants is not made until the waters have been applied to the beneficial purpose for which the proposed appropriation was applied for, the irrigation of certain designated lands, if, when the diverting channels and works, prosecuted with reasonable diligence, are completed, the water may not then lawfully be used on such lands because they remain and still are a part of the reservation, or of the public domain, unclaimed, unsettled, and unoccupied, or if the lands have since been restored to the public domain, and since have been lawfully claimed, occupied, and possessed, but such persons so occupying and possessing the lands refuse to take or use the water thereon or to apply it to the beneficial purpose for which the appropriation was applied for, the application, and the construction works, and the moneys expended thereon by the applicant are for naught. In other words, if the proposed ap-

proprietor is not able to complete and finally establish his appropriation by applying the water to, and using it for, the beneficial purpose for which it was proposed to be appropriated, either by himself or through the agency of some user, his appropriation fails. He may not file his application, construct his works, and then hold the water and wait for something to happen. He cannot withhold the water from the proposed beneficial use. He must not only be diligent in constructing the works, and in making the diversion, but he must also be reasonably diligent and expeditious in making application of the water to the beneficial use for which the appropriation was proposed, else he loses 10 his inceptive right. His appropriation will be measured by the quantity of water actually used for the proposed beneficial purpose.

We are of the opinion that, upon the face of the complaint, it is not made to appear that the engineer wrongfully or erroneously approved the defendant's applications, which were prior in time. However, should we be in error in holding that an inceptive right in and to the use of unappropriated public water upon or within a reservation can be initiated or acquired after the issuing of the proclamation, but before the reservation was actually opened and the lands subject to entry, settlement, and disposition, a contrary holding would not materially aid the cause of the appellants for the reasons hereinbefore suggested. And since the appellants, if entitled to recover, must do so upon 11 the strength of their own right or title, and not upon the weakness of that of their adversaries, it again follows that the demurrer was properly sustained.

We are therefore of the opinion that the judgment of the court below ought to be, and it therefore is, affirmed, with costs. Such is the order.

FRICK and McCARTY, JJ., concur.

HUNSAKER v. HARRIS.

No. 2071. Decided January 24, 1910 (109 Pac. 1.)

1. **FORCIBLE ENTRY AND DETAINER—STATUTORY PROVISIONS.** Comp. Laws 1907, sec. 3586, prescribing a special time for taking proceedings for appeal in forcible entry and detainer, is valid. (Page 227.)
2. **APPEAL AND ERROR—TIME WITHIN WHICH TO TAKE PROCEEDINGS—FORCIBLE ENTRY AND DETAINER.** Comp. Laws 1907, sec. 3586, relating to forcible entry and detainer, provides that either party may appeal within ten days from judgment, and section 3587 declares that the provisions of the Code relating to the appeals, so far as not inconsistent with the chapter, shall apply to proceedings thereunder. *Held*, that the time within which proceedings must be taken was that prescribed in said section 3586, and not the general provision contained in section 3301. (Page 227.)
3. **APPEAL AND ERROR—TIME FOR TAKING PROCEEDINGS—DISMISSAL.** An appeal in forcible entry and detainer not taken within the time prescribed will be dismissed. (Page 228.)

Appeal from District Court, First District; *Hon. W. W. Maughan*, Judge.

Action by Israel Hunsaker against Adolph Harris.

Judgment for defendant. Plaintiff appeals.

APPEAL DISMISSED.

J. D. Call for appellant.

T. D. Johnson and *C. E. Foxley* for respondent.

STRAUP, C. J.

This is an action brought in the district court for forcible entry and detainer. Upon a trial of the issues a motion

of nonsuit was granted and a judgment rendered on the 4th day of March, 1909. The judgment was entered on the day following. It does not appear that a motion for a new trial was made. The judgment of nonsuit, therefore, became final on the 5th day of March, 1909. On the 24th day of June, 1909, a notice of appeal was served and filed by the plaintiff, appealing from that judgment to this court. A motion is here made to dismiss the appeal on the ground that the appeal was not taken within time.

By our Code of Civil Procedure the rights and remedies in an action of forcible entry and detainer are defined and the procedure prescribed. It is there provided (section 3586, Comp. Laws 1907) that "either party may, within ten days, appeal from the judgment rendered." It is further provided that execution of the judgment shall not be stayed unless an undertaking, as by that section provided, be made and filed within ten days. By the succeeding section of the forcible entry and detainer chapter it is provided that "the provisions of this Code relating to civil actions, appeals, and new trials, so far as they are not inconsistent with the provisions of this chapter, apply to the proceedings mentioned in this chapter." The Code, relating to appeals in civil actions in general (section 3301, Comp. Laws 1907), provides that an appeal may be taken within six months from the entry of the judgment or order appealed from. If the appellant was entitled to prosecute the appeal under the provisions of section 3301, the appeal was taken in time. If he was required to prosecute the appeal under the provisions of section 3586, it was not in time; the appeal not having been taken until 111 days after the entry of the judgment. We think he was required to prosecute the appeal under the latter section and within ten days from the rendition of the judgment, or, at least, within ten days from the entry of it. The manner of taking appeals is statutory. The Legislature fixed a period of ten days within which an 1, 2 appeal may be taken from a judgment rendered in an action of forcible entry and detainer. It undoubtedly had the power to prescribe such a time. A party desiring

to appeal from a judgment rendered in such an action is required to take and perfect it in the manner prescribed by the special statutory provision relating to the subject of forcible entry and detainer. The provisions of the Code as to ordinary cases of appeal, so far as they are inconsistent with the special statutory provisions relating to the subject, have no application to such cases. (*Hastings v. Hennessey*, 52 Mo. App. 172; *Hadley v. Bernero*, 103 Mo. App. 549, 78 S. W. 64; *Slaughter v. Crouch* [Ky.], 64 S. W. 968; *Audubon Hotel v. Braunig*, 119 La. 1070, 44 South. 891; *Saxton v. Curley*, 112 Ill. App. 450; *Getty v. Miller*, 10 Colo. App. 331, 51 Pac. 166.)

The appeal not being in conformity with such provisions, it follows that we have no jurisdiction of the case, and that the appeal must therefore be dismissed, with costs. 3

Such is the order.

FRICK and McCARTY, JJ., concur.

MURPHY v. PAUMIE.

No. 2075. Decided January 24, 1910 (109 Pac. 10).

APPEAL AND ERROR—TIME FOR TAKING PROCEEDINGS—DISMISSAL.

An appeal in forcible entry and detainer not taken within the time prescribed will be dismissed. (Page 229.)

Appeal from District Court, Third District; *Hon. T. D. Lewis*, Judge.

Action by C. E. Murphy against C. Paumie.

Judgment for plaintiff. Defendant appeals.

DISMISSED.

C. S. Patterson for appellant.

James Ingebretsen for respondent.

STRAUP, C. J.

This is an action of forcible entry and detainer. The judgment was rendered and entered in the district court on the 29th day of January, 1909. It is not made to appear that a motion for a new trial was made. An appeal to this court was taken from the judgment on the 20th day of July, 1909. A motion was made to dismiss the appeal on the ground that it was not taken in time. On authority of the case of *Hunsaker v. Harris* (just decided) 109 Pac. 1, 37 Utah, 226, the motion is granted.

The appeal is, accordingly, dismissed, with costs to respondent.

It is so ordered.

FRICK and McCARTY, JJ., concur.

YOUNG v. HYLAND.

No. 2047. Decided January 27, 1910 (108 Pac. 1124.)

1. BOUNDARIES—ACQUIESCENCE—EFFECT. 'Where the owners of adjoining lands occupy their respective premises up to a certain line, which they recognized and acquiesced in as the boundary line for a long period of time, they and their grantees may not deny that the boundary thus recognized is the true one.'¹ (Page 234.)
2. BOUNDARIES—ACQUIESCENCE—EFFECT. The practical location of a boundary line may be established either by an express agreement or by acquiescence without surveys, and the practical location so fixed may be in accordance or in conflict with a prior or subsequent official survey, and, when a tract is laid off into city lots, the land-

¹ *Holmes v. Judge*, 31 Utah 269, 87 Pac. 1009; *Moyer v. Langton*, 37 Utah 9, 106 Pac. 508; *Rydalch v. Anderson*, 37 Utah 99, 107 Pac. 25.

owners may subsequently adopt a line as the boundary line, and recognize it as the boundary line. (Page 234.)

3. **BOUNDARIES—ACQUIESCENCE—EFFECT.** Where a boundary is open and visible, marked by monuments, fences, or buildings, and is knowingly acquiesced in for a long term of years, the law will imply an agreement fixing the boundary as located, and will not permit the parties or their grantees to depart from such line.² (Page 235.)
4. **BOUNDARIES—ACQUIESCENCE—CONSTRUCTION OF DEED—LAND CONVEYED.** A deed of a part of a lot in a designated survey, which describes the part as beginning at a point eighty-nine and seventy-six hundredths feet west of the southeast corner of the lot, and running thence west to the line of a street, thence north thirty-four and six-tenths feet, thence east a specified distance, and then south to the place of beginning, makes the south line of the tract conveyed the south line of the lot, and the boundary line between the lot and the adjoining lot as established by acquiescence is the boundary of the part of the lot conveyed. (Page 237.)
5. **BOUNDARIES—ACQUIESCENCE.** Where, as between adjoining landowners, a practical boundary line was agreed on or acquiesced in for a long time, and all persons interested occupied up and claimed to the line, the line as between the landowners was the boundary line; and neither of the landowners or their grantees could depart therefrom and claim beyond it. (Page 237.)

Appeal from District Court, Second District; *Hon. J. A. Howell*, Judge.

Action by Joseph T. Young against Elma Hyland.

Judgment for defendant. Plaintiff appeals.

REVERSED AND REMANDED FOR NEW TRIAL.

J. D. Skeen for appellant.

C. R. Hollingsworth for respondent.

STRAUP, C. J.

This case arose over a disputed boundary line. The appellant, who was the plaintiff below, owns a parcel of land in Ogden City, situate in the southerly portion of lot 10,

²Holmes v. Judge, 31 Utah 281, 87 Pac. 1014.

block 10, facing west, on a street called Grant Avenue. The respondent, the defendant below, owns a parcel of land lying to the south thereof in the northerly portion of lot 11. It is alleged in the complaint that the south line of plaintiff's land is bounded by an old fence line; that the plaintiff owns a parcel of land 34.6 feet north and south by 141.5 feet east and west, lying immediately north of the fence line; and that the defendant trespassed upon his land, and tore down and removed the fence. The plaintiff in this connection contended that as between the adjoining landowners the boundary line between lots 10 and 11 and the south line of his lot were fixed and established by a fence erected about the year 1869, which ever since and until it was torn down by the defendant, about a year prior to the commencement of this action, was recognized, and acquiesced in, as such boundary line by all parties interested. The defendant admitted in her answer that the plaintiff was the owner of a parcel of ground 34.6 feet by 141.5 feet, but alleged that such parcel was wholly within lot 10, and that the south line of plaintiff's land and the south line of lot 10 were coextensive. She alleged that the boundary line of the two lots was not at the place as indicated by the fence line, but was at a point five feet north of the fence line, as indicated by the "South Ogden survey," and hence the north boundary line of the defendant's land was five feet north of the fence line. The question in dispute, and which determined the judgment of the court below, therefore, involves the boundary line between lots 10 and 11. Upon a trial of the issues, the court found the boundary line to be as contended for by the defendant, five feet north of the old fence line, and at the place as shown by the survey referred to, and therefore awarded the ground in dispute, a strip five feet in width, to the defendant. From such judgment the plaintiff has prosecuted this appeal.

The findings and conclusions are assailed on the ground that they are not supported by, and are contrary to, the evidence. It is not essential to refer to the assignments in detail. The question presented on the appeal is pithily

stated in the brief of counsel for the respondent. They say: "The sole question involved in this appeal is whether or not the said fence was the boundary line between said lots 10 and 11. If so, then the respondent committed the trespass alleged by the appellant." The ground owned by plaintiff was formerly owned by Joseph Parry, who sold it to Moroni Brown. The latter sold it to Francis Knapp, who sold it to plaintiff. Parry testified that in 1869 there was a willow fence on the south side of the land which was occupied and afterwards sold by him. At that time, he took down the willow fence, and put up "a lumber fence on the line of the willow fence." He testified that "the supposition was that it was on the line, on the proper line, and no one questioned that at the time of my occupancy;" that the ground was not then surveyed "into city lots," but was surveyed into blocks and acre lots; that it was surveyed into city lots "when the Liberal Council got in," which was about the year 1889. He further testified: "I bought up to that willow fence line, and I will also state that I pulled that willow fence down and put up a lumber fence right on the same line, and I occupied that land until I sold it to Mr. Brown in 1879." Brown testified that he was familiar with the ground for about 57 years, and knew the fence line "between lots 10 and 11 of block 10, South Ogden survey;" that the board fence was there when he bought the land, and that in 1883 he replaced it with a wire fence, which was placed on the same line; that he used, occupied, and claimed the land up to the fence. The plaintiff testified that, when he bought the land, the agent of his grantor went with him on the ground, and told him that it "runs to the fence." Later he built a house on the land purchased by him, the south side of which is about five feet north of the fence. The evidence so adduced, showing the existence, maintenance, and recognition of the fence as a boundary line between the lots for many years, and that the adjoining owners of the ground occupied up to the fence, and never claimed beyond it, is in no particular disputed nor contradicted. Indeed, the defendant did not offer nor introduce any evidence on such

subjects. The contention made by her in that regard, again quoting from the brief of her counsel, is "that the fence was not upon the true boundary line between said lots 10 and 11, as shown by the plat of the said South Ogden survey," and that the true line is five feet north of the fence, and as shown by that survey, which was a resurvey made by or under the direction of the city council.

With respect to the difficulty in determining the corners of the original survey, the city engineer, after testifying that he was familiar with the land "a part of lot 10, block 10, South Ogden survey of Ogden City survey," testified, in response to questions asked him, as follows: "Q. I will ask you whether or not you are able to determine, or any of your employes have been able to determine, the location of the corners of the original survey of this tract of land? A. We have a great deal of difficulty in determining them, and we locate them the best we can from the old plat that was made in 1886. That plat is not consistent with itself. What I mean by that is that there are certain corners that you locate them from one direction and make a certain location, and you locate them from another direction and make another location, and you have to reconcile it as best you can. Q. In attempting to solve the difficulties, what do you take notice of on the ground, if anything? A. In some cases where we find an old corner, that the universal evidence or testimony of the owners there say—that is, the old original corner—why, we adopt that as the corner; otherwise we have to figure that as best we can from the plat, which is in nearly every case. Q. Are you able to determine the original corner of the survey of the South Ogden survey? A. No, sir." He further testified that one of the corners of the street on one side of the block in question within two years prior to the trial was moved about a rod from where it was shown to be by the old fence lines. No witness in the case testified that the boundary line between lots 10 and 11, according to any original or primary survey, was where claimed by the respondent, five feet north of the old fence line, or that there are any monuments,

maps, plats, or filed notes of any such survey showing the boundary line to be at such place. The court in determining the boundary line disregarded the old fence line, and fixed it as shown by the new or resurvey.

We think that the principle of law here involved was decided in the cases of *Holmes v. Judge*, 31 Utah, 269, 87 Pac. 1009; *Moyer v. Langton*, 37 Utah, 9, 106, Pac. 508, and *Rydalch v. Anderson*, 37 Utah, 99, 107 Pac. 25. In those cases the doctrine is recognized that, where the owners of adjoining lands occupy their respective premises up to a certain line which they recognized and acquiesced in as their boundary line for a long period of time, they and 1 their grantees will not be permitted to deny that the boundary line thus recognized is the true line of division between their properties. It is, however, urged by the respondent that, inasmuch as the fence was originally erected before any official survey was made laying the tract of land off into city lots and blocks, it cannot be considered as constituting a boundary line. A practical location of a boundary line may be, and often is, agreed upon, fixed, and established, either by an express agreement, or 2 by acquiescence, without surveys. It may be so agreed to and fixed before, as well as after, the making of an official survey. The practical location so fixed may be in accordance or in conflict with such survey. When the tract was laid off into city lots and blocks, we do not see any reason why the landowners could not thereafter adopt a fence, which was then there, as the boundary line between lots 10 and 11 to the same effect as though they had thereafter constructed, or agreed upon, or acquiesced in, a new fence, as and for the boundary line. The evidence shows that, after the tract was laid off into city lots and blocks, the old fence was for many years thereafter recognized and acquiesced in as and for the boundary line between lots 10 and 11. Mr. Freeman, in his notes to the case of *Washington Rock Co. v. Young*, 110 Am. St. Rep. 685, says: "If a fence has been built or a hedge has been set out as a boundary, and thereafter has been recognized as the true boun-

dary by adjoining owners for many years, or if a fence already erected is maintained and treated and occupied up to as their line of division for a long period of time, they cannot as a rule question the correctness of its location." Many cases are cited by him in support of this principle. On page 682 of the same volume he also says: "It is a well-settled rule of law, resting upon public policy, that a practical location of boundaries which has been acquiesced in for a long period of years will not be disturbed. It is binding on the parties thereto and their privies in estate. This doctrine has been adopted as a rule of repose with a view of quieting titles and preventing litigation." In support of which, again, many cases are cited.

The practical location of the boundary line here in question was fixed and established by the old fence line, and, as such, was acquiesced in for a long period of years, and, until the alleged trespass of the defendant, neither adjoining owners nor any of their predecessors in interest ever claimed beyond it. If the fence line was acquiesced in as the boundary line, the defendant, as against plaintiff's predecessors in interest, could not lawfully claim beyond it; and we see no good reason why she should be permitted to now claim beyond it as against the plaintiff. The respondent further urges that the starting point of the appellant's land and the respondent's land is the same. That is true. The starting point of appellant's land, as described by his deed, is the southeast corner of lot 10; respondent's the northeast corner of lot 11. But where is that point? The respondent asserts, and the trial court held, that the southeast corner of lot 10 and the northeast corner of lot 11 is at the point as shown by the resurvey referred to. The appellant asserts, and we agree with him, that the point is as indicated by the old fence line which existed there for many years marking the boundary line between the two lots before and after the ground was laid off into blocks and lots, and which was recognized and acquiesced in as such boundary line by all parties concerned. Here the language of Mr. Justice Frick, in delivering the opinion of the court

in the case of *Holmes v. Judge*, 31 Utah, at page 281, 87 Pac., at page 1014, is very pertinent. He there said:

"In all cases where the boundary is open, and visibly marked by monuments, fences, or buildings, and is knowingly acquiesced in for a long term of years, the law will imply an agreement fixing the boundary as located, and will not permit the parties or their grantees to depart from such line."

The question here is not one of surplus ground, and who is entitled to it, as is incidentally argued by the respondent. The plaintiff purchased of his grantor 34.6 feet of ground situate in the southerly portion of lot 10. The description in his deed reads: "Beginning at a point 89.76 feet west of the southeast corner of lot 10, and running thence, west, 141.5 feet, to the east line of Grant Avenue; thence, north, 34.6 feet; thence, east, 141.5 feet; thence, south, 34.6 feet, to the place of beginning." In other words, the south line of the land conveyed to him is the south line of lot 10. He has 34.6 feet of ground lying immediately to the north of the south boundary line of lot 10. He by that deed of conveyance obtained no more. He claims no more in his complaint. The south line of his land and the south line of lot 10 being coextensive, the question is: Where is that line? If it is determined to be at the place as shown by the official resurvey of the city, he has a parcel of land 34.6 feet by 141.5 feet lying immediately five feet north of the fence. If, on the other hand, the south line of lot 10 is determined to be at the place as fixed and established and as indicated by the old fence line, he has a parcel of land 34.6 feet by 141.5 feet lying immediately to the north of the fence line. In either case he gets but 34.6 feet of ground, and no more. The only question is, Where is the south boundary line of the parcel which was conveyed to him by his grantor? The plaintiff asserts that it is the south boundary line of lot 10. So does the defendant. So reads the deed. But the plaintiff asserts that the south boundary line of the lot is as indicated by the fence, while the defendant asserts such boundary line to be five feet north of the fence line.

The contention made by the respondent that because in the deed the land purchased by plaintiff was described as a part of lot 10, in block 10, "of South Ogden survey in Ogden City survey," the plaintiff purchased with reference to that particular survey, and hence the starting point of the description of his land, the southeast corner of lot 10, must be determined and taken to be at the point as shown by, or according to, that survey, regardless of old fence lines, or other monuments, or expressed or implied agreements, or acquiescence, of the adjoining landowners, showing it and a boundary line coextensive therewith to be fixed and established at another place, was made and refuted in the case of *Moyer v. Langton, supra*. The pertinent question is not where is the southeast corner of lot 10 and the south boundary line of the lot coextensive therewith, according to some particular official survey made by or under the direction of Ogden City, but, as between the adjoining landowners, where is that point as it was originally fixed and established by an original or primary survey, or by a practical location agreed upon or acquiesced in for a long period of time by the persons interested. Upon the undisputed evidence it being conclusively made to appear that, as between the adjoining landowners, a practical boundary line was agreed upon, or acquiesced in, for a long period of time, and that all persons interested occupied up and claimed 4, 5 to the fence line, and that, until the alleged trespass, no adjoining claimant ever claimed beyond it, we are of the opinion that as between such landowners the fence line so agreed upon or acquiesced in became and is the boundary line between such lots, and that neither the parties having so recognized and treated it, nor their grantees, may now depart therefrom and claim beyond it.

It follows that the judgment of the court below is not in harmony with such holding, and hence must be reversed, and the cause remanded for a new trial, with costs to appellant. Such is the order.

FRICK and McCARTY, JJ., concur.

PULOS v. DENVER & RIO GRANDE RAILROAD
COMPANY.

No. 2074. Decided February 9, 1910 (107 Pac. 241).

1. **MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK—OBVIOUS DANGERS—CONCURRENT NEGLIGENCE OF MASTER.** An employee engaged with a gang of men in loading a flat car with old rails, some of which are crooked, from the ground along the track, assumes the risk of injury from a rail falling off the car after being thrown on, though, because of a direction by the foreman, there were no braces on the car to prevent the rails from falling off, where the danger is as obvious to him as to the foreman. (Page 248.)
2. **MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK—SUFFICIENCY OF EVIDENCE.** Evidence *held* to show that the dangers of injury from a rail falling from a flat car after being thrown on in loading were as obvious to plaintiff as to the foreman. (Page 248.)
3. **APPEAL AND ERROR—RIGHT TO ALLEGE ERROR—ERROR INDUCED BY PARTY COMPLAINING.** Where the jury could properly render a verdict for plaintiff by following either of conflicting instructions, defendant, whose request induced the conflict and caused the error in its favor, cannot complain of the conflict.¹ (Page 252.)
4. **NEW TRIAL—GROUNDS—INSTRUCTIONS—INJURY TO SERVANT—CONFLICT—EVIDENCE TO SUPPORT.** In an action for injuries to an employee from a rail falling from a flat car after being thrown on the car in loading, the court instructed generally that defendant is liable for the negligence of "any agent, servant or employee," and then specifically instructed that defendant is not liable for the negligence of its foreman in charge of the work. There was no claim or evidence of negligence by any person working with plaintiff except the foreman. *Held*, that a verdict for plaintiff will be set aside, not because of the conflict in the instruction, but because it has no support in the evidence.² (Page 253.)
5. **NEW TRIAL—VERDICT CONTRARY TO INSTRUCTION.** Where the court instructed that defendant is not liable for the negligence of its foreman, and the evidence shows that, if plaintiff's injury was the result of any negligence, it was that of the foreman, a general verdict for plaintiff will be set aside as contrary to the instruction, and without support in the evidence. (Page 254.)

¹ Wood v. Railroad Co., 28 Utah, 351, 79 Pac. 182.

² Coates v. Railroad Co., 24 Utah, 304, 67 Pac. 670.

6. **NEW TRIAL—GROUNDS—VERDICT CONTRARY TO EVIDENCE.** A new trial should be granted in such case, as the verdict is without evidence to support it. (Page 257.)
7. **TRIAL—TAKING PLEADINGS TO JURY ROOM.** It is the duty of the court to construe the pleadings and to instruct the jury on the issues; and it is not proper to permit the jury to take the pleadings with them to the jury room unless they have been put in evidence as proof of some fact, and made exhibits in the case. (Page 258.)

Appeal from District Court, Third District; *Hon. M. L. Ritchie*, Judge.

Action by Michael Pulos against the Denver & Rio Grande Railroad Company.

Judgment for plaintiff. Defendant appeals.

REVERSED.

Van Cott, Allison & Riter for appellant.

P. T. Farnsworth, Jr., and *O. W. Carlson* for respondent.

STRAUP, C. J.

This is an action brought to recover damages for alleged personal injuries.

The plaintiff, who was an employe of the defendant, was engaged, with others, in loading steel rails on flat cars. While loading a rail it slipped off a car and struck and injured him. The accident occurred in Colorado. The plaintiff alleged that the rails were improperly and negligently piled on the car; that the defendant failed to provide braces on the side of the car; that the foreman of the defendant in charge of the work negligently ordered the plaintiff and others to lift a crooked rail from a ditch and throw it on the car; and that, by reason of conditions occasioned from the manner in which the rails were piled, and the absence of braces, a rail which was thrown on the car slipped off and struck the plaintiff, who, because of a ditch and of a space of

but five feet between the car and a precipitous mountain to the rear of him, could not make his escape after the rail was thrown and before it struck him. He also alleged that in Colorado the doctrine that a master is not responsible for an injury sustained by his servant through the negligence of a mere fellow servant was abrogated by statute, and that under the law of that state the defendant was liable for the injury sustained by the plaintiff, though solely caused by the carelessness or negligence of a mere fellow servant to the same extent and in the same manner as though the injury had been occasioned by the personal negligence of the defendant. The answer contained a general denial and pleas of assumption of risk, contributory negligence, and fellow service. The case was tried to a jury. A verdict was rendered for the plaintiff. The defendant appeals.

The material facts are: The defendant, near Ruby, in Colorado, rebuilt its tract by removing old rails and replacing them with new ones. The old rails, when they were removed, were strung along the track. At the time in question the defendant was engaged in loading the old rails on three flat cars pushed along the tract by an engine operated by a train crew. Two gangs of men, each consisting of about fourteen men, were engaged in loading the rails, one on each side of the car. The plaintiff and the other workmen with him were Greeks. The work was in charge of, and was directed by, a boss or foreman. The gang of fourteen men of which plaintiff was one, with their hands, lifted the rails, one at a time, weighing 650 pounds, and threw them on the cars. Two men on the car with bars placed the rails in position lengthwise the car after they had been thrown on. Other men picked up angle bars and other material which also were thrown on the cars. The foreman gave his orders and directions to an interpreter on the car, who repeated them to the men loading the rails. The rails were strung along the track about thirty feet apart. When the cars were moved to a place where the rails were lying, the men took hold of one of them, and upon a signal given by one of the men, it was raised to the desired position, and then upon

another signal, also given by one of the men, it was thrown on the car. Upon a signal given by the foreman to the conductor, the train was then pushed along where other rails were lying, and the operation repeated. The loading of the rails began in the morning by first loading the car nearest the engine. The middle car was then loaded. The plaintiff was injured between two and three o'clock in the afternoon, and while the men were loading the last car. At places where the surface of the ground was about level with the ties the rails were raised to just below the chin and then thrown. At such places the men loading the rails could easily see them on the car, and observe the manner in which they were placed and adjusted, and, after a rail was thrown on the car, they looked at it until it was adjusted by the men on the car. They then went to another rail. When the men on the car gave the signal "all right," the men on the ground lifted the rail and threw it. The track generally was straight. The rails loaded on the first two cars were straight. A car load consisted of about 120 rails. When a car was about half loaded, angle bars were placed on the side of the car for braces. That was done when the first two cars were loaded. There was an ample supply of bars for that purpose on the cars. When the plaintiff received his injury, about forty-eight straight rails and three crooked rails had been loaded on the last car. The crooked rails spoken of had but a slight curve, a bulge in the center from an inch to an inch and three-quarters. The forty-eight straight rails were first loaded on the cars and placed lengthwise, and in the center, of the car. Before the crooked rails were loaded, there was then a space of about a foot and a half on the floor of the car between the rails and the side of the car nearest the men loading the rails. At the place where the curved rails were lying there was a ditch, the bottom of which was about two feet below the level of the ties. At the rear of the men there was a precipitous mountain about one hundred feet high. The space between the mountain and the car was about five feet. When the place was reached where the crooked rails were lying, the interpreter suggested to the

foreman that the angle bars or braces had better be placed on the car. The interpreter and some of the men loading rails also suggested to the foreman that the rails at that place had better be carried to and loaded from the other side of the car where there was no ditch and no embankment. The foreman told the interpreter that it was not necessary to do so; that there were but a few rails at that place; that, when they were loaded, they would come to a good place, and to throw them on. The interpreter thereupon told the men that the boss said "there aren't very many rails there, just three of them—throw them on." The men thereupon proceeded to load the rails. Some of the witnesses testified that the car was about two feet above the heads of the men loading the rails. The rails were lifted, one at a time, by the fourteen men, the plaintiff being the fourth from the end, and were raised above their heads, and then thrown on the car.

The manner in which they were thus thrown on the car is best told in the language of the interpreter, who was a witness, and who testified, in behalf of plaintiff. The material parts of his testimony on this point, as they appear in the printed abstract of the record, are: "I saw the first curved rail thrown up from his (plaintiff's) side. It hit against the side of the straight rails, and then slid down onto the vacant space on the floor, which was about a foot and a half in width. The second curved rail also hit on the side of the straight rails and slid down. The third curved rail came up just the same as the other two, and slid down on top of the other two. It slid down from the straight rails onto the curved rails and stayed there. There were two men on top of the car at each end who had forks, and, if the rail didn't lie good, they would turn it. These men twisted that third rail and put it with the ball up on top of the two curved rails lying on the floor of the car. I saw Mike (plaintiff) and the men with him pick up the fourth curved rail down in this ditch. The top of the flat car stood about two feet higher than his head. The last rail thrown was a crooked rail, the same as the other three. I saw the rail land on the

car. It hit on the side of the straight rails, and then slid down. It didn't stay on the car. The three rails that were thrown just before struck upon the side of the stright rails that were piled along the center of the car and then slid down and into place. The rail that injured the plaintiff hit the side of the straight rails the same as the others, but slid down. There was no place to catch on, no empty place the same as the others. The other three caught the empty space. It struck upon the straight rails at the same place, in the same manner as the former rails that had been thrown up. It slid down one end first and slipped right off the car, because it had no empty place on the car. It hit on the sides and slipped down on top of the others, of the flange of the other rails, and then fell down. The top of the car had been covered by other rails, except ten inches. This is the reason I give why the rail slipped off. There was no difference in the way in which it was thrown. It struck in the same place, in the same way. There were no braces along the side of the car, no obstructions of any kind to prevent rails from slipping off. There were braces, angle bars, on these other cars." When the men threw up "this first crooked rail, they looked at it, but it didn't fall down. It slid down on the car, but not off. It slid down onto the vacant space on the flat car. The men could see this. It stayed there, and they saw the rail stay there. Then they picked up the second crooked rail, and threw it in the same manner. It hit just the same as the first one, and slid down on the floor the same as the first one. I don't know whether the men saw this, because I was standing on the car. But I could see their heads, and I saw the men looking at it. They threw the rail up, and then looked at it. They could see it fall down if they had any place. I didn't see anything because I was standing up. I saw the men looking at it. They threw the rail up, and then stood and looked at it. That second rail slid down and struck the bottom of the car. Two or three before this one did the same. The men stood and watched the second rail all the time the same as they did the first rail. When they threw the third rail, they didn't watch it.

After throwing it, they didn't have anything to do. They waited about a minute until the men with the forks fixed it, and then they picked up the next. They would wait until the men with the forks got through fixing the rail. Then they would know it was ready to go ahead and pick up the next rail when the train moved. When the third crooked rail was thrown, it hit the straight rails and fell down over the two crooked rails, and the men on the ground stood there and watched it. The two men fixed it; and then they moved again. The men would wait until the two men on top of the car fixed the rail before they would move their position. They would stand there watching the two men do their work, and, when they got through, they would move. This had been customary from the time they started in that morning up to the time of the accident. This fourth rail was thrown in just the same manner as the other rails. We had put in about three or four braces on the other two cars that were already loaded. They are put right in holes on the outside of the car, so that the men down on the ground loading the rails can see whether the braces are there or not. They can see because it is outside."

The plaintiff testified: That he had been working for the defendant about sixteen or seventeen days "changing rails," but had never loaded rails before the day he was injured. That the rail which slipped off the car and injured him was thrown on evenly. That at places where the ground was about level with the ties he could plainly see the rails on the cars after they were thrown on, and that the top of the platform of the car was about eight inches below his chin, and that in throwing the rails on the car he took a good look at them. "I saw they were piled on the top of the car. I could see that. When there was a straight track, I could see that," but that in loading the crooked rails he "was not able to see the top of the car, and I did not know how those three (crooked) rails already upon the car were piled," because of the ditch and the car being about two feet above his head. That "we were going to take" the last rail thrown on the car "to the other side because it was easier to throw

the rail up; the ground on the other side being level. We did not take it to the other side because the foreman did not do it. The interpreter told us that the foreman ordered us to throw the rail up from that side;" that the end of the rail which slipped off the car struck him and broke his leg, and that he could not make his escape because of the ditch and the embankment. He testified that men were working on the other side of the car from the time he commenced work in the morning until he got hurt, and, though he saw them moving about on the other side, he did not know what work they did, and did not see, and did not know, whether they threw rails on the cars, or whether they threw any rails on the car on which he loaded rails, and did not remember whether he heard any noise as the rails were thrown on. He further testified that the third curved rail, after it was thrown, struck the rails on the car, but that he did not remember whether it rolled down onto the vacant space, and that he could not see whether the space was still full or empty, and that he did not know whether the third curved rail "stuck or where it went after it was thrown on the car." That after it was thrown he saw the two men on top of the car doing something, but that he could not see from below what they were doing. "I knew that the foreman had those two men there to fix the rails. I didn't know that they were putting the third rail in its position because I couldn't see them. We then moved on to the fourth curved rail and lifted it up. There were no braces on the side of the car at this time. I knew that. After the foreman ordered us to throw it from that side, we threw it onto the car the same as the others. In throwing that fourth rail, we didn't find it very difficult, but we thought it would be better to throw it from the other side, easier to throw it from the other side. We did not, however, find very much difficulty to throw the rail. We were not afraid to throw the rail from the side of the car next to the mountain. We had picked up this rail intending to carry it over to the other side, and the only reason we wanted to do that was that it was a little more advantageous to throw the rail from the river than the

mountain side. None of the fourteen men suggested that it was dangerous to throw the rail from the mountain side, nor did they discuss this. I did not think it was dangerous." The plaintiff also put in evidence chapter 67 of the session Laws of Colorado of 1901, which, and as claimed by plaintiff, entirely abrogated the doctrine that the employer is not responsible for an injury inflicted upon his servant caused by the negligence of a mere fellow servant with the injured servant, and made the employer liable, in such case, for the negligence of any agent, servant, or employe of the employer in the same maner and to the same extent as if the carelessness, omission of duty, or negligence causing the injury was that of the employer. It was conceded by the defendant that the doctrine by such statute was abrogated, but it contended that as a condition precedent to a recovery in such case the injured servant was required to give the employer written notice within sixty days from the occurrence of the accident, and as provided by an act passed and approved in 1893 (Laws 1893, c. 77), being sections 1511a and 1551b, c. 37, Mills' Ann. St., which was put in evidence by the defendant. It was shown that no notice was given the defendant by the plaintiff. Various decisions of the Supreme and district courts of Colorado and the federal courts bearing on the acts in question were also put in evidence, some by the plaintiff, others by the defendant. It was contended by the plaintiff that the act of 1893 was repealed by the act of 1901, and hence the giving of a written notice to the employer was not required in order to render him liable for the negligence of a mere fellow servant. The trial court holding with the plaintiff in such contention in paragraph thirteen of the charge, instructed the jury as follows: "You are instructed that under the laws of the state of Colorado, in which the plaintiff was injured, and in which state his cause of action, if any, arose, if he was in the exercise of due care at the time, his employer would be liable for injuries sustained by him, resulting from the carelessness, omission of duty, or negligence of the employer, or resulting from the carelessness, omission of duty, or negli-

gence of any other agent, servant, or employe of the employer in the same manner and to the same extent as if the carelessness, omission of duty, or negligence, causing the injury was that of the employer." But in paragraph twenty-three of the charge the court also instructed the jury as follows: "If you should find that the acts of negligence upon which the plaintiff relies for a recovery in this case were due solely to the fault of the foreman in charge of the work, and if you should also find that in the prosecution of the work of loading rails on the day in question the principal duty of this foreman was that of superintendence, then you are instructed that this is a complete bar to any recovery in this case. I need not stop to tell you why this is so, it being sufficient for the purposes of this case to say that under the laws of Colorado, where the plaintiff met with his injuries, the plaintiff is precluded from recovering anything on that ground, if you so find the facts from the evidence." In stating the alleged negligence the court charged the jury that "the only acts of negligence alleged against the plaintiff's employer for you to consider are, first, whether the employer negligently failed to provide any braces along the sides of the car; and, second, whether the rails on the car were negligently and improperly piled." The court expressly charged the jury that they could not render a verdict for the plaintiff upon the alleged negligence that the foreman "carelessly and negligently ordered the plaintiff and said other employees to go into the ditch and pick up the curved rail lying therein and while standing in the ditch to throw a curved rail upon the car," and that they could not consider such allegations "as any ground for enabling the plaintiff to recover against the defendant, and, so far as such acts of the foreman in directing the workmen to enter the ditch, pick up, and throw the rail are concerned, there is nothing in those acts to warrant holding the defendant liable to the plaintiff;" and further charged them "that the plaintiff does not claim that the defendant was negligent because it failed to load from the opposite side of the car the rail which fell and broke his leg, and the defendant is

not obliged to meet any such issue, and you are not to consider it."

It is first urged by the appellant that the court erred in giving paragraph thirteen of the charge. The question as to the correctness of that charge involves a construction of the Colorado statute. We find it unnecessary to express an opinion on that subject. Even though it should be held that the trial court in that paragraph gave the statute referred to the proper construction, and correctly ruled that under such statute the giving of a written notice to the defendant by the plaintiff was not essential to render the defendant liable for the negligence of a mere fellow servant with the plaintiff, yet we are also of the opinion that the judgment of the court below must be reversed and set aside because of the views entertained by us on other assignments. We think on the evidence adduced it conclusively appears that the plaintiff assumed the risk, and upon that ground, if 1
not upon others, he was not entitled to recover, and that the defendant's motion to take the case from the jury and to direct a verdict in favor of the defendant ought to have been granted. It, of course, is conceded that the plaintiff assumed the usual and ordinary risks incident to the employment and the extraordinary risks known to and comprehended by him, or which were so open and obvious that he is charged with knowledge and a comprehension of them. The plaintiff was twenty-three years of age, and it must be presumed that he was a man of ordinary intelligence and capacity. He had worked for the defendant sixteen or seventeen days "changing rails." True, he had not engaged in loading rails before the day on which he was injured. But the loading of rails from the ground to flat cars, under the circumstances as disclosed by the evidence, does not involve anything difficult of comprehension. The character of such work is not complex, but is very simple. The risks involved and the dangers to which one may be exposed from a rail slipping or falling as it is lifted from the ground and thrown on the car in the manner and 2
under the circumstances disclosed by the evidence are

not only open and obvious, but incident to the work itself, and easily understood and readily comprehended. That a rail, thrown under such circumstances on other rails upon the car, may not rest and remain in the position, or at the place, where thrown, but may bound or slide, or roll off, is a matter of common knowledge and general experience. Special experience in such work is not necessary to acquire knowledge of the risks incident thereto, or to comprehend the attending dangers arising therefrom. Plaintiff all forenoon and until he was hurt was engaged in loading rails on the cars. He saw and knew the manner in which the work was done and the rails thrown and piled on the cars. He saw and observed this when the first two cars were loaded, and when the forty-eight straight rails were loaded on the third car, and until it was moved to the crooked rails lying in the ditch. At that place he testified, he could not see the top or floor of the car because the surface of the ground where he was standing was about two feet below the level of the ties. But he knew the number of rails on the car and the position and manner in which they had been placed and piled, and that there was a space on the floor of the car where there were no rails, just before the car was moved to the crooked rails. That condition had not changed, but remained just as he saw it and knew it before the car was moved to the crooked rails in the ditch, and before he, with others, undertook to load them. Though at the particular time when the crooked rails were lifted and thrown he could not see the floor of the car, yet from what he had just seen and observed a moment before he well knew the position of the rails on the car on which he was about to throw the crooked rail. He heard the suggestions made to the foreman that the rail be carried to and loaded from the other side, and that braces had better be put up before the crooked rail was loaded. He also testified that he knew that the braces had not been put up. Of course, that was obvious and open to the view of any one situated as was the plaintiff. He further testified that the only reason that the men desired to carry the rail to and load it from the other side was

because it was easier to there throw and load it, and not that much difficulty was found, or that it was dangerous, to load it on the side of the car where it was lying. This is not a case where it may be presumed that the master, because of his superior knowledge, may, better than the servant, have comprehended the danger, or where the master had better opportunity to ascertain the extent and character of the danger to which the servant was exposed, or where the servant might be justified in yielding his own judgment and deferring to that of his master, or where relying upon promises, assurances, or representations of the master the servant was lulled into a sense of security. Though it should be said that the accident would not have happened had the braces been put up, and that they were not put up because of the orders or directions of the foreman, yet the plaintiff well knew that the braces were not up, and whatever danger was involved in loading the rails without them was just as readily understood and comprehended by him as by the master. It is a case where the servant, with the master, had equal knowledge, and equal means of knowledge, and where the servant, equally with the master, understood and comprehended the dangers and risks involved, and voluntarily undertook the performance of the work. If a court in submitting the case to the jury should inform them that the plaintiff assumed the usual and ordinary risks incident to the employment, and all other risks and dangers of which he had knowledge and which were appreciated by him, or which were so obvious and open as to imply knowledge and a comprehension of them by him, what disputed fact was there to submit to the jury for their finding? Should the jury find that the plaintiff did not know that the braces were not up, or that he did not appreciate or comprehend that rails thrown on the pile of rails on the car might bound, or slide, and, without braces, roll or fall off after they had been thrown on, such a finding would clearly be against the evidence. And that is just what the jury did in this case. The court charged them that "if the manner in which the rails were piled and the absence of braces from the side of

the car were so plain, obvious, and open that the plaintiff, by the use of his faculties of sight and hearing, considering his age, experience, and capacity for acquiring knowledge, ought to have known of their existence, it is the same in point of law as though he actually did know of their existence," and, if he had such or actual knowledge, the plaintiff could not recover. The jury, by their verdict, found that he had no such knowledge, when, by his own testimony, actual knowledge on his part was shown. We are not unmindful of the contention made that the plaintiff, though he knew how the forty-eight straight rails had been placed on the car, he, as testified to by him, did not know and could not see from his position on the ground how the three crooked rails had been piled, and especially that the third had been placed on top of others. The contention necessarily is predicated on the assumption that the danger thus created was unusual, and not incident to the work, and was unknown to the plaintiff. When he threw the crooked rails on the car, he saw that they were thrown on the pile of rails which he testified was from two to three feet high in the center of the car—others testified but a foot or a foot and a half—and that the rails thrown, after striking the pile, rolled down the side of it. That was just as obvious to him as that there were no braces on the side of the car. Though standing in the ditch he could not see a rail lying on the floor of the car, yet he knew that the rails which were thrown at that place, and which slid down the side of the pile, were lying at the side of it either side by side or some on top of others. When the third rail was thrown, the plaintiff saw it strike the pile and slide down. It was just as natural to expect that it would slide, or be placed and rest on the other two rails, as that it might rest on and occupy some of the vacant space of the floor of the car. There was nothing unusual or extraordinary about the occurrence should it have happened either way. Whether it happened one way or the other was an incident to the work itself, and arose from the operation of it. He knew some rails had to be and were piled on others. Whether the three crooked rails were placed side by side on the floor

of the car, or one on top of others, in no way induced or influenced his conduct in throwing the fourth rail and did not affect the manner of doing it. We cannot assent to the conclusion that, if the third rail had been placed by the side of the other two on the floor of the car, the danger of the fourth rail sliding and falling off the car after it was thrown on the pile was a risk assumed by the plaintiff, but that the placing of the third rail on top of the other two created an unusual and extraordinary danger not assumed by him. We think the court erred in refusing the defendant's motion to direct a verdict in its favor, and again erred in refusing to grant a new trial on the ground that the verdict was in the particular stated contrary to the charge, and was not supported by the evidence.

We think that the verdict in other particulars was also clearly against the charge, and was not supported by the evidence. In paragraph thirteen of the charge the court instructed the jury that the defendant was responsible for the negligence of any agent, servant, or employee of the defendant causing the injury to the same extent and in the same manner as if the carelessness or negligence causing the injury had been that of the defendant. But in paragraph twenty-three of the charge the jury were instructed that if the acts of negligence relied on for recovery "were due solely to the fault of the foreman in charge of the work," whose principal duty "was that of superintendence," then no recovery could be had. Whatever might be said in support of the view that the two charges are in conflict, and that the first is right and the second wrong, and that the wrong instruction was induced by the defendant's request and was error in its favor, nevertheless it clearly appears that the court in most positive terms charged the jury that the negligence of the defendant's foreman in charge of the work was "a complete bar to any recovery in this case." If the jury could properly have rendered a verdict for the plaintiff by following either charge, then the defendant, whose request induced the conflict and caused the error in its favor, could not complain of the conflict; for, on well- 3

recognized principles, if the defendant obtained an advantage to which it was not entitled, and when the jury responded even to that demand, the defendant could not be heard to complain of the inconsistency of its own creation. (*Wood v. Railroad Co.*, 28 Utah, 351, 79 Pac. 182; *Rear-don v. Railroad Co.*, 114 Mo. 384, 21 S. W. 731.) But suppose a court should charge a jury in a case founded on negligence that the defendant was liable for ordinary negligence, and such was the correct principle of law applicable to the case, and then should also charge the jury on the request of the defendant that no recovery could be had unless the defendant was guilty of wilful and wanton negligence, which was not the law applicable to the case, and a verdict should nevertheless be rendered for the plaintiff. If, now, there was evidence to support a finding of both ordinary and wilful negligence, the defendant could not complain of the conflict. Though it could not be told whether the jury followed and applied the one or the other charge, yet, if they followed the first, the defendant could not complain because they followed and applied the correct principle; and, if they followed the second, it could not complain because there still was evidence to support the verdict. But if there was a total want of evidence to show willful negligence, the defendant could properly complain because it could not be told whether the jury followed and applied the one or the other charge, and, if the second, there was no evidence to support the verdict. (*Coates v. Railroad Co.*, 24 Utah, 304, 67 Pac. 670.) The proper complaint in such case would not be that there was a conflict in the charge, but that the verdict, in view of the charge, has no support. Now, that is the situation here. The court charged the jury in general terms that the defendant was liable for the 4 negligence of any agent, servant, or employee, in its employ, and then specifically charged them that it was not liable for the negligence of its foreman in charge of the work. It cannot well be said that the jury were authorized to disregard the specific instruction and follow the general one. In view of the charge, the only support which

the verdict, as rendered by the jury, can have on the issue submitted to them in respect of the alleged negligence arising from the manner in which the rails were piled on the car is the evidence of negligence of some agent, servant, or employee of the defendant other than the foreman. We have looked in vain for such evidence. There is no evidence to show, nor is it claimed by the plaintiff, that any one working with him in lifting or throwing the rails was negligent. It is not claimed, nor is it shown, that the interpreter on the car was negligent. It is claimed that the men on the car piling the rails were negligent, but there is not a scintilla of evidence to show such negligence. It is not contended that any of the straight rails were piled improperly or negligently. Nor is it claimed that the first two crooked rails which were thrown on the car were improperly or negligently piled or placed. The contention made is that the third crooked rail thrown on the car was improperly and negligently placed and piled because it was placed on top of the two crooked rails with the ball of the rail up instead of down. In their brief counsel for respondent on this point say: "Had the men who were straightening the rails thrown the third rail over onto the ten-inch space, as they might easily have done with safety, there would have been a level space of about a foot and a half for the fourth rail to fall upon after striking the side of the straight rails. To question that it was the grossest negligence on the part of these men to permit that third rail to remain and to adjust it on top of the two rails, thus providing an incline plane for the fourth rail to slide down over, seems to us to be inconceivable." In no other particular is it contended that the men on the car or that any other agent, servant, or employee of the defendant was negligent. There is nothing to show, except the bare assertion of counsel, that the placing of the two crooked rails side by side and on the bottom of and lengthwise the car, and the third rail on top of those, was improper or negligent. It might as well be said that it was negligent to place one rail on top of others, and that careful conduct required that no more rails should have been placed

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on the car than fairly covered the floor of the car. We see no evidence on which to base a claim of negligence that the rails were improperly or negligently piled or placed, or that the men on the car were negligent in any other particular; and since the jury were told that no verdict could be based on the negligent acts of the foreman, and there being a total want of evidence showing negligence on the part of any other servant, agent, or employee of the defendant, there is a total want of evidence to support the verdict upon that issue. Furthermore, there being a total want of evidence to show that the rails were improperly or negligently piled on the car, the court again erred in refusing appellant's motion and request to take that issue from the jury. The court having submitted the case to the jury on both questions of negligence—one in failing to provide the car with braces, the other the manner in which the rails were piled on the car—it cannot be ascertained whether the verdict was rendered on one or both of such questions, or, if rendered on one only, on which one it was founded.

Even though the verdict as rendered was wholly based on the alleged negligence in failing to provide braces on the car, still the verdict, in view of the charge, cannot be upheld. The court submitted the case to the jury entirely on the theory that the alleged commission and omission of acts were servant's not master's acts. True the court stated to the jury that, under the Colorado statute, the employer was liable for his own negligence, and that it was alleged in the complaint that the defendant negligently failed to provide braces; but nowhere in the charge were the jury instructed that a verdict could be rendered against the defendant on the theory that the failure to provide braces or to place them on the car was an omission of master's duties. We do not say that under the evidence adduced the failure to place the braces on the car was an omission of master's duties. What we do say is that the question of the employer's negligence was not submitted to the jury, and for that reason the verdict which was rendered by them cannot be supported on any such theory. To the contrary, the case

was submitted to the jury entirely on the theory that the failure and omission to place the braces on the car were servant's acts, and the court gave the jury the binding instructions that, if such failure or omission was due to the negligence of the foreman, no recovery could be had; but, in effect, if due to the negligence of some other servant, agent, or employee of the defendant, then the plaintiff could recover, if he was not himself guilty of negligence and had not assumed the risk. We again look in vain for any evidence to show that such failure or omission was due to the negligence of any such servant, agent, or employee. The evidence discloses, without dispute, that there was an ample supply of angle bars, which were used for braces, lying on the car, but that they were not put up because of the orders or directions of the foreman. If the failure and omission to put up the bars under the circumstances constituted negligence, such negligence was the negligence of the foreman. But the court expressly told the jury that the negligence of the foreman in such particular was "a complete bar to any recovery in this case," and failed to submit the case to the jury on the theory as to whether such failure or omission was the employer's negligence. So, even as to that issue, all that the jury had, under the charge, to render a verdict on, was evidence of the negligence of some servant, agent, or employee of the defendant other than the foreman. If the jury based their verdict on supposed evidence of such negligence, then the verdict has no support because there is a total want of such evidence; and, if they based it on evidence of the negligence of the foreman, then it was against the charge. And it cannot be told whether they did the one or did the other. We have no more right to presume that they ignored the specific charge and followed the general charge and based their verdict on evidence of the negligence of the foreman than that they based it on supposed evidence of negligence of some agent, servant, or employee of the defendant other than the foreman. We are not now determining the question of the sufficiency of the evidence to go to the jury on the issue of the alleged negligence in failing

to provide the car with braces. What we do say is that the only evidence of negligence bearing upon such question relates to the acts of the foreman in not permitting the braces to be put up, and, since the court charged that his negligent acts were "a complete bar to a recovery," 6 the verdict, in view of the charge, cannot stand, because it is against the charge and has no support, and ought to have been set aside by the trial court on the defendant's motion for a new trial.

We are also of the opinion that the trial court erred in charging the jury on the issues. The court charged them that "the amended complaint sets forth what the plaintiff claims with reference to the controversy, and the amended answer sets forth the defendant's version thereof. Both these are made a part of these instructions, and you are to refer to them for a particular statement in detail as to what each party alleges with reference to the controversy in question." Following this, the court, after stating in "general terms" the substance of the material allegations of the complaint, and the denials and averments contained in the answer, then also charged the jury: "This brief description of the general nature of the cause of action alleged and the defenses set up thereto is not intended as a substitute for the statements contained in the complaint and answer, nor to relieve you of the necessity of consulting the complaint and answer for your guidance in determining the particular matters alleged as a cause of action or by way of defense." From an inspection of the charge, it does not appear that the amended complaint and amended answer are attached to the charge, nor does the charge itself contain copies of them. But from the language of the court that they were made a part of the charge, and that the jury were required to refer to them to ascertain what was claimed by each party, we must presume, in the absence of anything shown to the contrary, that the court did what is implied by the language employed, and that the amended complaint and amended answer were attached to the charge or that they or copies thereof, were otherwise given the jury to consult and to

refer to; otherwise the language of the court is rendered meaningless and the direction useless.

The charge involves two erroneous statements, one which necessarily implies that the jury had the right to take the pleadings with them to the jury room, and the other that it was their duty to consult them and determine for themselves "the particular matters alleged as a cause of action or by way of defense," and to refer to them to ascertain the "controversy in question." It is the duty of the court to construe pleadings and to charge the jury on 7 the issues. It is not proper to permit the jury to take the pleadings with them to the jury room, unless they have been put in evidence as proof of some fact, and then they are taken, not because they are pleadings, but exhibits. We have no statute permitting the jury to take the pleadings. We see no good purpose to be accomplished by, but much harm to result from, permitting it; for as is said in Brickwood's Sackett on Instructions to Juries, at section 214, "it is not always easy for the court to understand the pleadings, and certainly it would be too much to expect that a jury would not misunderstand them." In this state the court is required to charge the jury in writing upon the law applicable to the case. "What issues are raised by the pleadings," says Mr. Blashfield in his work on Instructions to Juries, section 93, "is a question of law which it is the exclusive province of the court to determine." And the "clear weight of authority is to the effect that it is the province and duty of the court to state specifically to the jury what issues are raised by the pleadings, and that it is erroneous to refer the jury to the pleadings to ascertain for themselves what the issues are; that the construction of the pleadings and the issues raised thereby are questions for the court alone to determine and not for the jury." (11 Ency. Pl. and Pr. 153.) The court in the written charge itself should clearly define the particular issue or issues submitted to the jury, and should specifically state to them the material facts alleged, denied, and admitted in respect of such issues. In doing so the court may state to the jury the substance of

such material averments and denials contained in the pleadings, or, when clearly and concisely expressed therein, may do so in the language of the pleadings themselves. But the jury to ascertain the issues must look alone to the charge of the court. To charge the jury that the complaint and answer are made a part of the charge, and that the jury must look to them to ascertain and determine the issues, is to require the jury to place their own construction upon the pleadings, and to determine the issues for themselves. And, after the issues are stated to them by the court, to then also charge the jury that such statement as made by the court did not relieve them "of the necessity of consulting the complaint and the answer of your guidance in determining the particular matters alleged as a cause of action or by way of defense," is still more objectionable; for such a charge not only permits, but invites, the jury to disregard the statement of the issues as made by the court, and to determine the issues for themselves upon an inspection and examination of the pleadings. The rule that the jury on questions of law are bound to accept and obey the charge of the court applies to the charge defining the issues as well as to all other instructions of the court on questions of law, and the jury have no license to disregard one more than the other. Instructions similar to those given by the court have frequently been before the courts, and have generally been held erroneous and prejudicial. (1 Brickwood's Sackett, Instructions, section 170; 2 Thompson on Trials, section 2314; 11 Pl. and Pr. p. 153; Blashfield, Instructions to Juries, section 93 *et seq*; *Keatley v. I. C. R. Co.*, 94 Iowa, 685, 63 N. W. 560.)

For the reasons heretofore given, the judgment of the court below is reversed, and the case remanded for a new trial. The appellant filed a printed brief consisting of 370 pages, including the covers. Our rules provide that the expense of printing abstracts and briefs not to exceed seventy-five cents for each page may be taxed as other costs. If an expense of printing the brief at seventy-five cents a page should be allowed to be taxed as costs, such costs alone would

amount to \$276. We think the brief was unnecessarily voluminous, and that the expense thereof should not be allowed as costs. The appellant, however, is entitled to tax costs for the printing of a proper brief. We think a brief of the expense of thirty-five dollars was all that was necessary, and that amount only will be allowed to be taxed as costs for such expense.

The appellant is given all other taxable costs.

FRICK and McCARTY, JJ., concur.

LE VINE et al. v. WHITEHOUSE et al.

No. 2069. Decided February 10, 1910 (109 Pac. 2).

1. **APPEAL AND ERROR—CROSS-ASSIGNMENTS OF ERROR—NECESSITY.** A question raised by respondents is not presented for review without a cross-assignment of error. (Page 267.)
2. **SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—MUTUALITY OF OBLIGATION.** A contract sought to be enforced provided, *inter alia*, that if the purchasers failed to make any of the payments mentioned for a period of sixty days after the same became due, vendors should be "released from all obligations to convey the property," and the purchasers would "forfeit all right thereto and to any money paid under the agreement." *Held*, that it did not lack mutuality of obligation. (Page 268.)
3. **SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—MUTUALITY OF OBLIGATION.** Comp. Laws 1907, sec. 2463, provides that every contract for the sale of any lands, or interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing and subscribed by the party by whom the sale is to be made, or by his lawful agent thereunto lawfully authorized in writing. Section 2467 provides that every agreement that by its terms is not to be performed within one year shall be void unless it, or some note or memorandum thereof, be in writing and subscribed by the party to be charged therewith. *Held*, that contracts of the kind referred to therein, to be binding and enforceable, need be signed by vendor only, and specific performance will not be denied for lack of mutuality because not signed by the purchaser.¹ (Page 268.)

¹ Bailey v. Leishman, 32 Utah, 132, 89 Pac. 78.

4. **FRAUDS, STATUTE OF—AUTHORITY TO PURCHASE LAND—NECESSITY OF WRITING.** That authority of agents to purchase land was not in writing does not invalidate a contract signed by them; there being at the time the agreement was entered into, no statute in this state requiring an agent's authority to purchase land to be in writing. (Page 271.)
5. **CONTRACTS—RESCISSION FOR FRAUD.** A party who has been induced to enter into a contract by false and fraudulent representations may rescind on discovery thereof. (Page 272.)
6. **CONTRACTS—RESCISSION FOR FRAUD—LOSS OF RIGHT.** A defrauded party will generally lose his right to rescind if he takes any benefit under the contract, or does any other act implying intent to abide by or affirm it, after he becomes aware of the fraud. (Page 272.)
7. **CONTRACTS—RESCISSION FOR FRAUD.** A party misled must, as soon as he learns the truth and discovers the falsity of statements relied on, disaffirm the contract with all reasonable diligence, and he cannot derive all possible benefit from the transaction and then claim relief from his own obligation by a rescission or refusal to execute. (Page 273.)
8. **VENDOR AND PURCHASER—RESCISSION FOR FRAUD—WAIVER OF RIGHT.** After vendors learned that corporate stock given in payment of seven hundred dollars on the price had no actual or market value, they continued for eleven months to accept payments on the contract, aggregating six hundred dollars, and made no claim for rescission for misrepresenting the value of the stock till sued for specific performance, when they filed an amended answer nearly two and one-half years after they discovered the fraud which they claimed was practiced on them. *Held*, that they waived whatever right they had to rescind therefor. (Page 273.)
9. **VENDOR AND PURCHASER—BREACH OF CONTRACT—FAILURE TO PAY TAXES.** A contract by which vendors, on receiving payment, agree to execute a good and sufficient warranty deed to the property described, free and clear from all incumbrances except that the purchasers shall pay the taxes for a specified year, contemplated that the taxes for that year might become delinquent when final payment was made, and that in that event vendors might convey subject to an incumbrance for such taxes, and hence failure of the purchasers to pay the same was not a breach. (Page 273.)
10. **VENDOR AND PURCHASER—BONA FIDE PURCHASER—NOTICE PUTTING ON INQUIRY.** Where, if purchasers, with ordinary diligence, had followed the line of inquiry suggested by information furnished them by vendor before paying any part of the purchase money, they would have been fully advised of an equity of third persons in the land, they are charged with the same knowledge as to their rights as they would have acquired had they pursued the investi-

gation suggested, and they were not relieved from inquiring by assurances that the contract on which the equity was based was abandoned. (Page 278.)

11. **VENDOR AND PURCHASER—BONA FIDE PURCHASER—EVIDENCE.** Evidence *held* to show that a certain party was not a bona fide purchaser without notice. (Page 279.)
12. **SPECIFIC PERFORMANCE—KEEPING TENDER GOOD—NECESSITY.** Plaintiffs suing for specific performance tendered the money when they demanded execution of a deed to land involved, and in their complaint alleged they were ready and willing to perform their part of the contract. *Held*, that this entitled plaintiffs to prevail without a tender into court; the decree for plaintiffs in such case being made conditional on payment within a specified time. (Page 279.)
13. **SPECIFIC PERFORMANCE—RECIPROCAL DEMANDS—CONDITIONAL DECREE.** Where there are reciprocal demands, and anything remains to be done by one obtaining a decree for specific performance, which, in equity and good conscience, he ought to do, the court may and usually does, make the decree conditional that, in case of his failure to do what remains for him to do, the petition on which relief is granted will be dismissed. (Page 279.)
14. **INTEREST—SUSPENSION—KEEPING TENDER GOOD.** To discharge interest, a tender must be kept good by payment into court. (Page 280.)

Appeal from District Court, Third District; *Hon. T. D. Lewis*, Judge.

Action by Catherine E. Le Vine and another against J. W. Whitehouse and others.

Judgment for defendants. Plaintiffs appeal.

REVERSED.

W. D. Riter and *M. E. Wilson* for appellants.

Smith & Price and *Hurd & Hurd* for respondents.

McCARTY, J.

This is an appeal from a judgment rendered in the district court of Tooele County, Utah, wherein the plaintiffs sought to have specifically enforced a written contract signed

by the defendants J. W. Whitehouse and his wife, Ettie Whitehouse, in which they agreed to sell and convey to the plaintiffs, and the plaintiffs agreed to buy of them, certain real estate situate in Tooele County, Utah, consisting of about two hundred acres of land, for the sum of \$2000. This agreement was signed by Louis Le Vine for Catherine E. Le Vine, his wife, as her attorney in fact, and by Milando Pratt for Elizabeth R. Pratt, his wife, as her attorney in fact. Seven hundred dollars of the purchase price was to be paid in shares of stock of the Bingham West Dip Tunnel Company, a corporation, which stock the vendors agreed to accept in lieu of \$700 in cash. The balance of the purchase price, \$1300, was to be paid as follows: "\$100 in cash upon the delivery of the agreement, and \$100 to be paid to the vendors at Lincoln, Utah, each sixty days thereafter for a period of fourteen months," within which time the whole of the purchase price was to be paid. The vendees were to pay all taxes for the year 1905 and thereafter should the agreement be extended. The agreement further provided that: "In the event that the second parties (plaintiffs herein) shall fail or neglect to make any of the payments as hereinbefore provided for the period of sixty days after the same shall become due, then the first party shall be released from all obligations to convey said property, and second parties shall forfeit all right thereto and to any money paid under this agreement, and this agreement shall become null and void. And the said parties of the first part, on receiving such payments as hereinbefore provided, agree to execute and deliver to said parties of the second part, or their assigns, a good and sufficient deed to said property herein described, the title thereto to be free from all incumbrances (except that the second parties shall pay the taxes for the year 1905.) . . . First parties further consent that second parties may have possession of said premises upon the execution and delivery of this agreement." This agreement was filed for record, and recorded, February 21, 1906, in the office of the county recorder in Tooele County, Utah.

It is alleged in the complaint that the plaintiffs, shortly after the date of said agreement went into possession of the land therein described, and, at the time of the execution and delivery of the agreement, paid and delivered to the vendors 1400 shares of the stock of the Bingham West Dip Tunnel Company which the vendors accepted in lieu of \$700 in cash; that the vendees paid the vendors \$100 at the time the agreement was entered into and \$100 on January 1, 1905, and \$100 each sixty days thereafter, the last payment being made on November 8, 1905, for the installment due on November 1, 1905; that before the expiration of sixty days from January 1, 1906, when the next installment fell due, the plaintiffs offered and tendered to the vendors, at Lincoln, Tooele County, Utah, the balance of the purchase price, amounting to \$600, together with interest at the rate of eight percent. per annum on the sum of \$100 from January 1, 1906, and the taxes assessed against said property for the year 1905. Plaintiffs further allege a full performance of all the conditions in the agreement on their part to be performed, and further allege that the vendors refused to perform; and, after setting out that the vendors were contriving to defraud plaintiffs of the land described in the agreement by executing a deed of conveyance to Theodore G. Schulte, prayed a specific performance of the agreement, and that said "Schulte may be decreed to surrender and convey the said lands to the plaintiffs, the plaintiffs being ready and willing, and hereby offering, specifically to perform the said agreement."

Defendants admit the execution of the agreement in question, and admit the payments alleged in plaintiffs' complaint, but they allege that the payments were made by Louis Le Vine on behalf of himself and Milando Pratt and not otherwise; that neither Louis Le Vine nor Milando Pratt had power of attorney or other written, or any, legal authority from plaintiffs or either of them to execute or enter into the agreement mentioned on behalf of plaintiffs or either of them; that neither of the plaintiffs were bound, or in any manner obligated, thereby; and that no mutuality ex-

isted in relation thereto between them and defendants. It is further alleged in the answer that Louis Le Vine and Milando Pratt, as agents of plaintiffs, falsely and fraudulently represented the value of the 1400 shares of stock, at the time it was received by defendants as part of the purchase price of the land in question, to be of the value of fifty cents a share, and further falsely and fraudulently represented that, if defendants would accept the 1400 shares of stock as part of the purchase price of the land at fifty cents a share, the said Louis Le Vine and Milando Pratt would purchase the said 1400 shares of stock from the defendants at any time after the execution of the agreement that defendants would make demand upon them for the purchase of the whole of said stock; that defendants relied upon these statements, and were thereby induced to enter into the contract mentioned and to accept said stock in lieu of \$700; that the stock was not worth fifty cents per share or any other amount whatever; and that the same was, and still is, entirely worthless, all of which was known to Louis Le Vine and Milando Pratt, and unknown to the defendants. Defendants further allege: "That the said defendants J. W. Whitehouse and his wife thereafter upon numerous and divers occasions requested the said Louis Le Vine to take the said stock and pay them the said sum of fifty cents per share, or to sell the same for them at that price according to his said promise and agreement, but that he failed, neglected, and refused, and still does fail, neglect, and refuse, to do so." Defendants further allege that the plaintiffs failed and neglected to pay the taxes assessed against the land in question for the year 1905. They also allege that a few days prior to November 15, 1905, Louis Le Vine informed the defendants that the plaintiffs would not pay the taxes or any part thereof, neither would they pay any more money on the purchase price of the land, and that Louis Le Vine then and there requested defendants to sell the land on such terms and conditions as they thought proper, provided Louis Le Vine should receive what money had been paid thereon and the 1400 shares of stock which

had been issued to defendants as part of the purchase price of the land; that thereupon the defendants began to negotiate for the sale of the land, and on or about the 29th day of January, 1906, the defendants J. W. Whitehouse and his wife sold the land in question to Theodore G. Schulte, their codefendant.

Upon the issues thus tendered, a trial was had, and the court, after hearing the evidence, made and filed its findings of fact and conclusions of law, and entered its decree denying to plaintiffs the relief prayed for in the complaint and dismissing the action.

The court, so far as material here, found: (1) That neither Milando Pratt nor Louis Le Vine had any written authority from plaintiffs, or either of them, "for the execution of said written agreement, and neither of them had ever been constituted the attorney in fact for the said respective parties for whom they respectively undertook to execute said agreement." (2) That at the time the agreement was entered into the stock of the Bingham West Dip Tunnel Company had no actual market value; but that neither J. W. nor Ettie Whitehouse knew of the worthlessness of the stock; that they relied upon and believed the statements of Milando Pratt and Louis Le Vine in relation to the value of the same. (3) That on the 29th day of January, 1906, the defendants J. W. and Ettie Whitehouse entered into an agreement with Theodore G. Schulte (codefendant), whereby they agreed to sell and Schulte agreed to purchase, the land in question, together with other lands, for the sum of \$2750, \$1200 of which was paid thereon by Schulte "without any knowledge that plaintiffs were claiming any rights in the property mentioned in plaintiffs' complaint, but at the time of the payment of the balance (\$1550) of said purchase price mentioned in the agreement of said Schulte with said Whitehouse and wife, on or about the said 23d day of February, 1906, the said contract or agreement (between plaintiffs and J. W. and Ettie Whitehouse) . . . had been placed with the county recorder of Tooele County, Utah, the same having been recorded

February 21, 1906." The court, in its eighth finding of fact, found "that neither the said Louis Le Vine nor Milando Pratt, either as agents or attorneys for their respective wives or otherwise, did agree with the said Whitehouse and wife, or either of them, to rescind the said agreement mentioned, . . . nor authorized the said Whitehouse and his wife to resell said lands." This finding is contrary to the allegations of the answer and the contentions made by the defendants on this appeal. No cross-
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assignment of error was filed by respondents (defendants); therefore no question on that issue is presented for review by this appeal. We would not refer to the question at all were it not for the fact that counsel for respondents have somewhat elaborately discussed this phase of the case in their printed brief.

Appellants have assigned numerous errors, all of which in some way challenge the correctness of the findings of fact made and the judgment rendered by the court. The questions presented by the assignment of errors relate to and involve the affirmative propositions urged by respondents in support of the judgment, and may be classified as follows: (1) Want of mutuality in the contract. (2) That the contract was not signed by plaintiffs in person nor by any one having written authority from them to sign it. (3) That the respondents J. W. and Ettie Whitehouse were induced to enter into the contract through fraudulent representations of Milando Pratt and Louis Le Vine respecting the value of the 1400 shares of stock which was accepted by the Whitehouses in lieu of \$700 in cash, and that this alleged "inequitable conduct" on the part of plaintiffs' agents rendered the contract "unfair, unjust, and wholly inequitable." (4) That time was of the essence of the contract and that plaintiffs, in failing to pay the taxes on the land covered by the contract, amounting to \$4.40, which became delinquent November 15, 1905, forfeited their right to a specific performance of the contract. (5) That defendant Schulte was a *bona fide* purchaser of the land in question, and for that reason specific performance should not be de-

creed. (6) That whatever tender was made by plaintiffs of the balance of the purchase price of the land prior to and at the trial of the cause was not kept good by paying the money into court.

We will consider and briefly discuss the questions involved in the order in which we have stated them.

The contract, among other things, provided that if the vendees, appellants, should fail to make any of the payments therein mentioned for a period of sixty days after the same became due, then the vendors, respondents, would be "released from all obligations to convey the property," and appellants would "forfeit all right thereto 2 and to any money paid by them under the agreement." It will therefore be readily observed that the contract is not lacking in mutuality of obligation. But counsel for respondents claim, if we correctly understand their position, that under the contract there is no mutuality of remedy, for the reason that it was not signed by appellants in person nor by any one who had written authority from them to sign it, and that therefore it could not be specifically enforced against them. It is further urged that, as the contract by its terms was not to be performed within a year, it was void under section 2467, Comp. Laws 1907, which, so far as material here, is as follows: "In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, be in writing and subscribed by the party to be charged therewith: (1) Every agreement that by its terms is not to be performed within one year from the making thereof." These alleged infirmities of the contract, which, to some extent, involve the construction of section 2463, Comp. Laws 1907, we will consider together, as they present practically the same question of law. Section 2463, Comp. Laws 1907, provides that "every contract for the leasing for a longer period than one year, or for the sale of any lands, or interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing and subscribed by the party by whom the lease or sale is to be made, or by his lawful 3

agent thereunto authorized in writing." From the reading of the foregoing sections of the statute, it will be seen that it is only necessary that some note or memorandum be made of the contract and signed in the one case, by the party "by whom the sale is to be made" and, in the other, by the party "to be charged therewith." The authorities almost uniformly hold that contracts of this kind, to be binding, and enforceable, need be signed by the vendor only, and that specific performance will not be denied for lack of mutuality because not signed by the vendee. In 6 Pomeroy's Equity Jurisprudence (volume 2, Equitable Remedies) section 770, the author says:

"Where a contract for the sale of lands is signed only by the defendant, it is clear that the plaintiff need never have performed his agreement. There was a clear lack of mutuality in the terms. Yet it was clearly held that the contract could be enforced against the party who had signed. The cases all agree upon the point. The filing of the bill made the *remedy* mutual."

The same author, in his work on Specific Performance (section 75), says:

"It may, perhaps, be sustained upon the following grounds: The statute of frauds does not reach the substance of contracts and render them invalid or valid; it simply furnishes a rule of evidence. Whenever, therefore, any agreement is enforced against a defendant who has signed it by a plaintiff who has not, it cannot be said that the agreement, so far as it purports to bind the plaintiff, is a nullity. In a suit against him the statute does no more than require a certain kind of proof, in case he avails himself of it as a defense. The defense, however, is wholly a personal one; and, if he neglects to set it up, the agreement would be established against him notwithstanding the statute. For these reasons, it cannot be said that a memorandum signed by one party alone is so completely wanting in mutuality that no action upon it can be sustained."

See also, 29 Am. and Eng. Ency. Law (2 Ed.), 858; 3 Parsons on Contracts, sec. 9.

In a note to the case of *Ullsperger v. Meyer* (217 Ill. 262, 75 N. E. 482, 2 L. R. A. [N. S.] 221), reported in 3 Am. and Eng. Ann. Cas., the compiler has, beginning on page 1036, collected and reviewed cases from nearly all the states, as well as many English cases, and in the course of his review and discussion of the cases he says:

"The memorandum prescribed by the statute of frauds is usually required by the statute to be signed by the 'party to be charged' or by 'parties to be charged.' In either case by the great weight of authority the quoted words are held to refer, not to the party or parties 'charged' with the contract, but to the party or parties 'charged' in the action; that is, the defendant or defendants. And the fact that the plaintiff has not signed the memorandum does not affect his right to maintain the action."

And again, beginning near the bottom of page 1037, he says:

"By the great weight of authority a verbal acceptance of a written offer to sell or to buy property is sufficient to constitute a complete and obligatory agreement on which to charge the person by whom the offer is signed. In such case, if the memorandum is otherwise sufficient, when it is assented to by him to whom the proposal has been made, the contract is consummated by the meeting of the minds of the two parties, and the evidence necessary to render it valid and capable of enforcement is supplied by the signature of the party sought to be charged to the offer to sell or buy."

A further discussion of this question will be found in a note to the case of *Bailey v. Leishman* (32 Utah, 132, 89 Pac. 78), reported in 13 Am. and Eng. Ann. Cas. 1121. In 2 Page on Contracts, section 691, the author says:

"The statute does not require the contract, note, or memorandum to be signed by both parties, but only by the party to be charged therewith. . . . Accordingly, a contract, note, or memorandum is sufficient if signed by the party to be charged therewith, though not signed by the party seeking to enforce it. Thus a memorandum of a contract to convey land, signed by the vendor alone, . . . may be enforced by the promisee."

The contract in this case, however, was signed by the duly authorized agents of appellants. True, the authority of the agents was not in writing; but this does not invalidate the contract, there being no statute in this state, at the time the agreement was entered into, requiring an agent's authority to purchase land to be in writing. In 29 A. and E. Ency. Law (2d Ed.) 861, it is said:

"The general rule is that parol authority is sufficient to enable an agent to make a contract for the sale of personal or real property.

But, as regards real property, the contrary doctrine is upheld by many decisions, based usually upon a statutory requirement to that effect."

See also, 2 A. & E. Ency. L. & Pr. 809.

In Pomeroy on Specific Performance, section 79, the author says:

"Contracts, however, relating to real estate, as for sale, letting, and the like, need not be under seal, and the rule is settled that the authority of an agent to enter into such agreements may be given by parol, and may, therefore, be implied from acts and circumstances; unless, as is the case in certain states, the authority to make such contracts is required by statute to be in writing."

As we have observed, at the time the agreement in question was entered into, there was no statute of this state requiring the agent's authority to contract for the purchase of real estate to be in writing, therefore this case does not fall within the exception to the general rule 4 mentioned in the foregoing authorities. We are clearly of the opinion that the contract is not open to the objections urged against it by the respondents.

The next question for consideration is the alleged misrepresentations of Milando Pratt and Louis Le Vine to the defendants J. W. and Ettie Whitehouse respecting the value of the 1400 shares of stock received by the Whitehouses in part payment of the land covered by the contract. Respondents contend that these alleged misrepresentations rendered the contract "unfair, unjust, and inequitable." The record discloses that Le Vine, at the time he negotiated with Whitehouse for the purchase of the land, represented the stock to be worth fifty cents per share, and stated that none had been sold for less than that sum. The record, however, also shows that Whitehouse must have known that the stock had only a speculative value; and, according to his own testimony, he discovered about a month after the agreement was entered into that the stock had no actual or market value, and that he thereafter, without protest, continued to accept payments (aggregating \$600) on the contract until the 8th day of November, eleven months after he learned that the stock was practically without value. In fact, the first in-

formation the plaintiffs had that the Whitehouses intended to base their rescission of the contract on the ground of the alleged misrepresentations made to them respecting the value of the stock, so far as shown by the record, was when they filed their amended answer, March 12, 1907, nearly two and one-half years after they discovered the fraud which they claim was practiced upon them. Furthermore, the record conclusively shows that these alleged misrepresentations had nothing whatever to do with the refusal and failure of the Whitehouses to perform their part of the contract, and that this defense, so far as appears from the record, never occurred to them for more than a year after they had announced that they did not intend to live up to the contract. The defense mainly relied on by them at the trial was that Le Vine had refused to make any further payments on the contract and had requested the defendant J. W. Whitehouse to sell the land to other parties and refund to him the money which he had paid on the contract, and that he (Whitehouse), in pursuance of this request from Le Vine, sold the land to defendant Schulte. But, as we observed in our statement of the case, the court found against the defendants on this issue. The rule is that, where a party has been induced to enter into a contract by 5, 6 false and fraudulent representations, he may, upon discovery of the fraud, rescind the contract; but the great weight of authority holds that, if the party defrauded continues to receive benefits under the contract after he has become aware of the fraud, he will be deemed to have affirmed the contract and waived his right to rescind. In 9 Cyc. 436, the rule is tersely, and, as we think, correctly, stated as follows:

"The party defrauded will generally lose his right to rescind if he takes any benefit under the contract or does any other act which implies an intention to abide by it or an affirmation of it after he has become aware of the fraud."

Many cases are cited in the footnote in support of this doctrine. Mr. Pomeroy, in his work on Specific Performance (Section 222) states the rule as follows:

"In accordance with this principle, if the party to whom a misrepresentation has been made, after having ascertained the real facts of the case, and thus discovered the untruth of the statements, goes on acting in pursuance of the contract, treats the property acquired under it as his own, or otherwise conducts himself with respect to it as though it were a subsisting and binding engagement, he thereby waives the benefit of the misrepresentations, and cannot allege them 7 as a ground either for rescinding or resisting enforcement of the agreement. In other words, the party who has been misled is required, as soon as he learns the truth and discovers the falsity of the statements on which he relied, with all reasonable diligence to disaffirm the contract, and give the other party an opportunity of rescinding it, and of restoring both of them to their original position. The party deceived is not allowed to go on deriving all possible benefit from the transaction, and then claim to be relieved from his own obligations by a rescission or a refusal to execute."

Tested by this principle, the acts and conduct of the defendants J. W. and Ettie Whitehouse after 8 they learned that the stock had no actual or market value must be held to be a waiver on their part of whatever right, if any, they had to rescind the contract because of the alleged fraudulent representations made to them respecting the value of the stock.

Nor do we think the claim that appellants, because they failed to pay the taxes assessed against the land for the year 1905, breached the contract is tenable. The concluding part of the fourth paragraph of the contract, we think, clearly shows that the payment of the taxes for the year 1905 by plaintiffs was not a condition precedent to their right to demand performance of the contract. The part of the contract to which we refer is as follows: "And the said parties of the first part, on receiving such payments as hereinbefore provided, agree to execute and deliver to said parties of the second part, or their assigns, a good and sufficient deed to said property herein described, the title thereto to be free from all incumbrances (except that the second parties shall pay the taxes for the year 1905.)" We think this clearly indicates that the parties, when the contract was drawn, had in mind that the taxes for 1905 might 9 become delinquent and unpaid when the final payment on the purchase price was made, and that in that event

the vendors might convey the property to the vendees subject to an incumbrance for the taxes for 1905.

In the latter part of November, or the first part of December, 1905, respondent J. W. Whitehouse entered into negotiations with J. H. Hurd, attorney at law, Walter A. Cook, and J. B. Taylor for the sale of the land in question and 120 acres of additional land in Tooele county, and on January 29, 1906, entered into a written agreement with one Theodore G. Schulte, one of the respondents herein, by the terms of which Whitehouse, for and in consideration of \$2750, agreed to sell and convey to Schulte, and Schulte agreed to purchase, the lands mentioned. At the time of the execution of the agreement, Schulte paid Whitehouse \$1200 of the purchase price of the land. On February 7, 1906, J. W. and Ettie Whitehouse executed deeds of conveyance of the lands covered by the agreement last mentioned to Schulte. The deeds were placed in escrow with the understanding that they should be delivered to Schulte on payment by him of the balance of the purchase price, \$1250 of which was to be paid on or before August 1, 1906, and the remaining \$300 on or before October 1, 1906. It is admitted that Schulte had no personal or pecuniary interest whatever in these transactions, and that he acted solely as the agent and trustee of Hurd, Cook & Taylor, who, as partners, manipulated the deal and furnished the money with which to purchase the land. On February 23, 1906, Hurd, Cook & Taylor paid the balance of the purchase price of the land less a small discount, and the deeds thereto were delivered to Schulte, who, on February 26, 1906, had them duly recorded in the office of the county recorder of Tooele County.

As we have observed in the foregoing statement of the case, the trial court, in the seventh finding of fact, found that the agreement last mentioned was made by Schulte as trustee for Hurd, Cook & Taylor, "in entire good faith, and the sum of \$1200 paid without any knowledge that said plaintiffs were claiming any right in the property mentioned in plaintiffs' complaint." Appellants contend that this finding was erroneous for the reason that Hurd, Cook & Taylor were in

possession of sufficient facts respecting appellants' interests in that portion of the land (200 acres) covered by their contract with the Whitehouses to put them upon inquiry before they paid any part of the purchase price on the contract entered into by defendant Schulte. Cook and Hurd, who, as we have observed, were members of the partnership for which Schulte acted when he contracted for the purchase of the land, were called as witnesses for the defendants, and Cook testified, in part, as follows: "At the time the negotiations were first taken up with me about buying this land, Whitehouse told me that there had been some kind of a deal on between him and Le Vine. That conversation took place in Salt Lake City about the latter part of November, or the first of December, 1905. He said Le Vine was sick of his proposition, and he was going to throw it up and he wanted his money back. . . . He did not tell me anything about the character of the proposition of Mr. Le Vine. We didn't go into details, not at that time. At another meeting, . . . I think it was on Sunday, January 24, 1906, I inquired whether the proposition that Mr. Le Vine had with Mr. Whitehouse was in writing. He said there had been an agreement, but it did not amount to anything because it was all off. I took his word for it and made no further inquiry at that time. . . . At the time I entered into the agreement of January 29th (the Schulte agreement), I knew that I had had these conversations along in January and December. . . . We hadn't entered into any negotiations particularly at that time because I didn't know whether I wanted to buy or not. . . . I asked him to see a copy of the contract. He said he didn't have it, at least he didn't have it with him. On January 14th he told me this, and on January 29th I made an inquiry concerning the contract. At that time I asked Mr. Whitehouse what kind of a contract it was. He said it was an agreement where Mr. Le Vine was purchasing the property, and he said some stock had been paid and some money, but Mr. Le Vine wanted his money back. . . . Mr. Hurd was present on January 14th at the conversation

and took part in the same and was a party to the negotiations. . . . Whitehouse said Le Vine had paid some money and he (Whitehouse) had taken some stock. I don't recollect how much he said; somewhere about \$700. . . . Mr. Whitehouse did not tell me why his contract was dead and no good, any more than Mr. Le Vine was sick of the thing, and he was not going to buy it, and had refused to pay the taxes, and wanted his money back, and authorized him to go ahead and find a purchaser. . . . I took Mr. Whitehouse's statement in regard to the whole matter of the contract between him and Le Vine. Of course, I passed it up to Mr. Hurd. . . . As far as I was concerned, I never inquired farther. Whitehouse dropped me a line on the night preceding that he would be in town on January 29th. I think he came to the office and arranged to meet Mr. Hurd, because I would not talk to a man of that kind unless my attorney was present. I knew he was coming to negotiate again about the land of this suit. . . . I didn't request him to bring the contract in between Le Vine and himself."

Hurd testified, in part, as follows: "In one of these conferences the question came up in some way, and Whitehouse said that Le Vine had a contract for some portion of this land, but was unable to tell us what portion. . . . I asked him if the contract was oral or in writing, and he said, 'Oh, there isn't any contract. It is all off. . . . Le Vine hasn't got any interest in it at all.' That he had requested him to sell the property and give him his money back, what money he had paid. . . . My impression was, however, that it had been a written contract. . . . He convinced me that it was nothing, and that it was perfectly agreeable to Le Vine to have the sale go on, and that Le Vine was anxious to get his money back. We took his word for it. I am the same J. H. Hurd who appears for the defendant Schulte in this case."

The original answer of defendant Schulte filed in the case which was prepared by Hurd and duly verified by Schulte, was admitted in evidence. This answer, among other things,

contains the following allegation: "Defendant alleges that neither he nor, as he is informed and believes, the said Hurd, Taylor, nor Cook had any knowledge that the said plaintiffs, or either of them, had any claim or interest whatever in or to the said property mentioned and described in the plaintiffs' complaint; but, on the contrary, as defendant further alleges, *they and he were expressly informed and believed that one Louis Le Vine had theretofore had an agreement with the defendants, J. W. Whitehouse and wife, for the purchase of a portion of the lands embraced within the said agreement executed to this defendant*, but that the said agreement had expired according to the terms thereof, and that the said Le Vine had requested the said J. W. Whitehouse to refund to him such moneys as he had advanced under the said agreement, whatever the same might have been, and that he, the said Le Vine, had no claim whatsoever in or to the said lands or any part of the same." (Italics ours.) It is admitted that, before the balance of the purchase price (\$1500) under the Schulte agreement was paid, Hurd and Cook had read the agreement between the appellants and the Whitehouses, and Whitehouse in his testimony on this point, which is not denied said: "Before Schulte, Hurd, and Cook paid the \$1500, I advised them that some one else had an interest in the land. That was when the last \$1500 was paid. . . . I then told them that some parties were about to bring suit against me on account of the land, but they nevertheless went ahead and concluded the deal and got their deed."

We think the evidence of these three witnesses on this phase of the case, when considered in connection with the allegations of Schulte's original answer hereinbefore referred to, clearly shows that Schulte was not a *bona fide* purchaser without notice. According to their own version of the transactions in question, Cook and Hurd were in possession of sufficient facts to put an ordinarily prudent person upon inquiry. And it is apparent from the record that if they had, with ordinary diligence, followed the line of inquiry suggested by the information furnished them

by Whitehouse before any part of the purchase price 10 was paid on the Schulte contract, they would have become fully advised of appellants' equity in the land. This being so, the great weight of authority holds that they were charged with the same knowledge respecting appellants' rights as they would have acquired had they pursued the investigations suggested by the information imparted to them by Whitehouse. Mr. Pomeroy, in volume 2, section 597, of his work on Equity Jurisprudence (3d Ed.), states the rule as follows:

"If, however, it appears that the party obtains knowledge or information of such facts, which are sufficient to put a prudent man upon inquiry, and which are of such a nature that the inquiry, if prosecuted with reasonable diligence, would certainly lead to a discovery of the conflicting claim, then the inference that he acquired the information constituting actual notice is necessary and absolute; for this is only another mode of stating that the party was put upon inquiry, that he made the inquiry and arrived at the truth. Finally, if it appears that the party has knowledge or information of such facts sufficient to put a prudent man upon inquiry, and that he wholly neglects to make any inquiry, or having begun it fails to prosecute it in a reasonable manner, then also, the inference of actual notice is necessary and absolute."

True, it is claimed that Hurd and Cook were assured by Whitehouse that Le Vine had abandoned the contract which he and Pratt had entered into on behalf of plaintiffs; but this did not relieve them of the duty of pursuing the inquiry, and especially so in view of the fact that the record discloses that they had but little, if any, confidence in the integrity of the man with whom they were negotiating for the purchase of the land. Cook, in the course of his testimony, says: "I think he (referring to Whitehouse) came to the office and arranged to meet Mr. Hurd *because I would not talk to a man of that kind unless my attorney was present.*" In 2 Pom. Eq. Jur. (3d Ed.) section 601, the author says:

"When, however, the grantor, vendor, or mortgagor admits that his title was defective or incumbered, or that there was some outstanding claim upon or equity in the property, or makes any other communication which, unexplained, would constitute an actual notice, but adds a further declaration to the effect that such defect has been cured, or

incubance removed, or claim of equity rescinded and destroyed, the purchaser, according to the weight of authority, is not warranted in accepting and relying upon this explanation or contradiction; the information obtained under such circumstances and from such a source is sufficient to put a prudent man upon an inquiry. The reason of this is plain. The informant is under a strong personal interest to misrepresent or conceal the real facts. While the former branch of his communication is made against his interest, and is therefore more likely to be true, the latter part is in conformity with his personal interest, and is essentially untrustworthy."

See also, *Price v. McDonald*, 1 Md. 403, 54 Am. Dec., 657; 2 Jones on Real Prop. & Conv., sec. 1521.

We are of the opinion that the finding of the court that Schulte was a *bona fide* purchaser without notice 11 is not only unsupported by, but is contrary to, the evidence, and therefore erroneous.

The contention that appellants cannot prevail in this action because they have failed to pay into court the balance due the defendants J. W. and Ettie Whitehouse on the purchase price of the land is without merit. The evidence shows that appellants made a tender of the money when they demanded of the Whitehousss that they execute a deed to the land involved. And in their complaint appellants allege that they are ready and willing to perform their part of the contract. In cases of this kind, where there are reciprocal demands and obligations, and there is anything remaining to be done by the party who obtains a de- 12, 13 cree of specific performance, which, in good conscience, he ought to do, the court may, and usually does, make the decree conditional that, in case the prevailing party fails to pay the money (where payment is the thing required to be done) into court within a specified time, the petition upon which the relief is granted will be dismissed. In 6 Pom. Eq. Jur. (volume 2, Eq. Rems.) section 809, p. 1332, the author says: "It is enough that he (plaintiff) was ready and willing, and offered, and at the time specified, and even that he is ready and willing at the time of bringing the suit, unless his rights have been lost by laches, and that he offers to perform in his pleading." Appellants, by paying the money into court, would have stopped the running of interest on the deferred payments, and, not having done

so, they will, of course, be required to pay interest on the unpaid balance of the purchase price. In 3 Page on Contracts, section 1428, the rule is stated as follows: "If the contract provides for the payment in money, refusal of tender does not discharge the contract as far as the liability of the principal creditor is concerned, though it stops interest and costs, provided the tender is kept good. To discharge interest, however, the tender must be kept good. If the tender is not kept good, and the debtor makes use 14 of the money tendered by him, after tender is refused, he is liable for interest. (28 A. and E. Ency. L. [2d Ed.] 12.)

The judgment is reversed, with directions to the trial court to set aside its findings of fact heretofore made and filed in the case, and the judgment rendered thereon, and to make findings and enter judgment in favor of plaintiffs for a specific performance of their contract according to the prayer of the complaint and in accordance with the views herein expressed. Costs of this appeal to be taxed against respondents.

STRAUP, C. J., and FRICK, J., concur.

GAY v. YOUNG MEN'S CONSOLIDATED CO-OPERATIVE MERCANTILE INSTITUTION et al.

No. 2079. Decided February 11, 1910 (107 Pac. 237).

1. **APPEAL AND ERROR—HARMLESS ERROR—ERRONEOUS RULINGS—PLEADINGS.** A defendant entitled under his answer remaining after striking out a part thereof to prove the matters stated in the answer as a defense is not prejudiced by striking out of the part, in the absence of an affirmative showing that the court restricted him in proving his matters of defense. (Page 285.)
2. **APPEAL AND ERROR—HARMLESS ERROR—ERRONEOUS RULINGS—PLEADINGS.** Where the striking out of all of the parts of a pleading that a motion therefor specified would not have been prejudicial, an order granting the motion in part without specifying what was and what was not stricken was not prejudicial. (Page 285.)

3. **TRIAL—FINDINGS OF FACT—CONCLUSIONS OF LAW.** A finding that an officer of a corporation by reason of his relation to it was chargeable with knowledge of a trust agreement entered into between the corporation and a stranger whereby the latter conveyed real estate to the corporation in trust, etc., is not a finding of fact, but is a conclusion of law deducible from facts. (Page 286.)
4. **TRIAL—FINDINGS OF FACT—CONCLUSIONS OF LAW.** Where the facts found support a conclusion of law, the fact that the conclusion is stated in the findings of fact, instead of in the conclusions of law made by the court, is immaterial. (Page 286.)
5. **TRUSTS—RESULTING TRUST—CONVEYANCE TO SECURE DEBT OF ANOTHER.** Where the wife of a debtor of a corporation conveyed her land to the corporation to sell the same for the best price obtainable, and to retain so much of the proceeds as was necessary to pay the husband's debts, and to account for the same, the obligation of the corporation was in the nature of a trust, and its relation to the wife and the proceeds was in the nature of a trustee. (Page 286.)
6. **TRUSTS—SALE BY TRUSTEE—TERMS OF SALE—OBLIGATION OF TRUSTEE.** Where a corporation accepting a conveyance of land in trust to sell for the best price obtainable and account for the proceeds sold for a less price, it was liable to the grantor for the difference between what the property was actually sold for and what the corporation could have obtained for it. (Page 287.)
7. **TRUSTS—SALE BY TRUSTEE—VALIDITY—SALE TO OFFICER OF CORPORATE TRUSTEE.** Where a corporation accepting a conveyance of land in trust to sell for the best price obtainable and account for the proceeds transferred the land to one of its officers for three hundred dollars, and the officer five days later sold it to a third person for five hundred dollars, the transfer to the officer was not a sale, and the corporation was liable under its trust agreement to account for five hundred dollars. (Page 287.)
8. **CORPORATIONS—MEETINGS OF DIRECTORS—POWERS OF MAJORITY.** Under Comp. Laws 1907, sec. 324, providing that corporate powers are vested in and shall be exercised by the board of directors, a corporation exercises its powers through the board of directors; but a majority of the board, regularly convened, may exercise any corporate powers in the absence of the minority, and bind the minority. (Page 287.)
9. **CORPORATIONS—POWERS—BOARD OF DIRECTORS—NOTICE OF PROCEEDINGS.** Where the majority of the board of directors of a corporation, regularly convened, lawfully exercises any corporate powers, the minority members of the board are chargeable with knowledge of such acts, and, where the majority acquired property

in trust, every director was charged with knowledge of the trust relation, and, as against the claims of those for whom the corporation became a trustee, the members acquired no better right to the trust property than the corporation had. (Page 287.)

10. **CORPORATIONS—POWERS—BOARD OF DIRECTORS—NOTICE OF PROCEEDINGS.** The minority members of the board of directors of a corporation are chargeable with knowledge of legal corporate acts, whether the majority of the board directly exercise the corporate powers or authorize an agent to do so. (Page 288.)
11. **TRUSTS—VOLUNTARY TRUSTEE.** Where a corporation accepting a conveyance of land in trust to sell at the best price obtainable and account for the proceeds transferred the land to an officer for a price less than the best price obtainable, the officer became a volunteer trustee, and, when he sold the land at an advance, he held the proceeds in trust for the beneficiary. (Page 289.)

Appeal from District Court, Fourth District; *Hon. J. E. Booth*, Judge.

Action by Ann R. Gay against the Young Man's Consolidated Co-operative Mercantile Institution and another.

Judgment for plaintiff. Defendants appeal.

AFFIRMED.

J. W. N. Whitecotton and *A. Saxey* for appellants.

Johnson & Fowler and *A. B. Morgan* for respondent.

FRICK, J.

The respondent, after stating the corporate capacity of the appellant Young Men's Consolidated Co-operative Mercantile Institution, and that the defendant Rockhill at all times mentioned in the complaint was a director and vice-president of said corporation, in substance, alleged: That on a day stated a certain action was commenced in a justice's court by said corporation against one Joshua Gay, the husband of respondent upon a certain promissory note executed and delivered by said Gay to said Corporation for the sum of \$99.35; that, when said action was commenced on said

note, there was due thereon from said Gay to said corporation the sum of \$99.98; that the respondent, believing that said sum was due from said Gay, her husband, to said corporation, she offered to secure the payment thereof to said corporation by conveying to it by a proper deed of conveyance a certain parcel of land, which is duly described; that, pursuant to said offer, on the 5th day of July, 1906, she, by deed, conveyed said land to said corporation, and the said conveyance was made, and the said deed delivered by respondent, and received and accepted by said corporation, upon the expressed condition that said corporation should receive and hold the title to said land in trust for the respondent, and said corporation should sell the same for the best price obtainable therefor, but, in no event, for less than \$300; that, when said land was sold as aforesaid, said corporation should retain, out of the proceeds of sale the sum of \$99.98 as payment of said note, and should account for the balance of the proceeds of sale to respondent; that respondent did not know the value of said land, but said corporation and said Rockhill well knew that it was worth the sum of \$500; that shortly after the 5th day of July, 1906, said corporation fraudulently and collusively pretended to pass the title to said land to said Rockhill by deeding the same to him for the sum of \$300; that at the time of making said pretended sale and transfer of said land as aforesaid said corporation and said Rockhill knew that said land was worth in excess of \$500; that on the 26th day of July, 1906, said Rockhill by deed transferred said property to one King for the sum of \$500; that said respondent consents that said corporation shall retain the sum of \$99.98 out of the proceeds of said sale, namely, the sale for said sum of \$500; that she has demanded the difference between said \$99.98 and said \$500 from said corporation and said Rockhill, but that they have refused to account to her. Wherefore she prayed judgment that both of the appellants be required to account to her as before stated.

The appellants answered separately, and, after denying about all of the allegations contained in the complaint, they

set forth the transaction had with respect to the conveyance of said land between respondent and said corporation somewhat differently, and they claim that said Gay owed said corporation the sum of \$198.70, for which amount it had obtained judgment against him when said conveyance was made by respondent, and further aver that they had tendered to respondent the difference between said sum and the said sum of \$300, for which said corporation sold said land to the appellant Rockhill. Rockhill in his separate answer also denied any knowledge on his part with respect to the agreement entered into between respondent and his co-defendant corporation at the time of the transfer of said land by which said corporation agreed to account to said respondent for any balance due over and above the amount due from said Gay to said corporation.

The court, however, found the facts substantially as alleged in the complaint, with the exception that the court found that said corporation was entitled to the sum of \$207.25 out of the proceeds of the sale of the land referred to in the complaint. The court also found that said land was conveyed by the respondent, and the same was received and accepted by said corporation in trust, as alleged in the complaint. The court with respect to said Rockhill's connection with said transaction made the following finding: "That the said A. B. Rockhill, the defendant herein, by reason of his official connection with the defendant corporation, is chargeable with full knowledge and notice of the agreement between the said defendant corporation and the plaintiff, as hereinbefore set forth." It is also found that on the 21st day of July, 1906, the corporation sold the land in question to Rockhill for \$300 and that on the 26th day of the same month and year Rockhill sold the same to one George A. King for \$500. The court deducted from said sum of \$500 the sum of \$207.25, the amount found due by the court from said Joshua Gay to said corporation, and entered judgment against both said corporation and said Rockhill for the difference between the said last-named sum and the sum of \$500, the amount for which the court found the

property was sold by Rockhill. Both said corporation and said Rockhill join in the appeal from said judgment.

The appeal is upon the judgment roll, without a bill of exceptions. Some time prior to the trial, the respondent moved the court to strike certain portions from both of the answers upon the ground of redundancy. The court, in ruling upon this motion, made an order "that the motion to strike out be granted in part." Appellants now insist that the court erred in said ruling, because it is impossible to say what was and what was not stricken from the answers. By an inspection of the motions, it is made clear just what respondent desired stricken from the answers. If in this case the court had stricken all that was in the motions asked to be stricken, the appellants would not have 1 been prejudiced, for the reason that it would not have affected them in proving any material matter stated in their answers as a defense. In other words, the legal status of their answers, in so far as it affected their right to make proof of the matters therein alleged, was practically the same whether the court granted the motions to strike or not. This being so, and in the absence of an affirmative claim and showing that the court restricted appellants in proving their matters of defense, we cannot 2 say that the court committed any error; at least, not any prejudicial error. In view of the foregoing observations, the mere fact that by an inspection of the court's order to strike out it is impossible to say what particular portions of what was included within the motions was stricken is of no consequence.

Another assignment relates to the finding which we have set forth in full, by which the court found that the appellant Rockhill, by reason of his relation to the corporation, must be held to have had knowledge of the trust agreement entered into between the corporation and respondent, and of the fiduciary relation existing between them with respect to the parcel of land and the funds to be derived therefrom, and by reason of having such knowledge imputed to him Rockhill is not a *bona fide* purchaser of said land. Counsel con-

tend that this was not a finding of fact, but a mere conclusion of law deduced from other facts. We think counsel are right in this contention, but cannot see what effect it would have upon the judgment whether the paragraph be treated as a finding of fact or as a conclusion of law.

If the other facts found support the conclusion (and 3, 4 we think they do), it in legal effect makes no difference whether a conclusion of law is in one part or another of the findings and conclusions made by the court. Treating the finding as a mere conclusion of law, the question that arises is: Is the conclusion sound? Counsel for appellant insist that it is not. They contend that while in a particular sense, and for certain purposes, notice to the officers and directors of a corporation is notice to the corporation itself, that is so because the officers and directors are the agents of the corporation, but they insist that the converse of the proposition, namely, that notice to the corporation is also notice to the officer or director, is not true, because the corporation is not the agent of the officer or director. In view of the findings, it must be conclusively assumed that the parcel of land conveyed to the appellant corporation was by it accepted in trust to be sold for the "best price that could be obtained" therefor, but, in no event, for less than \$300; that when sold so much of the proceeds as was necessary to discharge the debts of respondent's husband to said corporation was to be retained by it, and the balance was to be accounted for to respondent. The corporation, therefore, obtained the property for a special purpose. The purpose was twofold: (1) To secure the debt due from the respondent's husband to it; and (2) to sell the property for that purpose, but for the best price obtainable, and to hold respondent's share of the funds in trust for her, and to account to her for the same. The obligation of the 5 corporation, therefore, was in the nature of a trust, and its relation to respondent and the fund was in the nature of a trustee, and we shall so treat it. The corporation in selling the property was bound to sell it for the "best price that could be obtained" therefor. If the property

was sold for a less price, the corporation would still be liable to respondent for the difference between what the property was actually sold for and what the corporation could have obtained for it. If the property in question, 6, 7 therefore, was sold for \$500, as found by the court, on the 26th day of July, 1906, then that amount was obtainable for it on that date. It is contended that the land was sold by the corporation to Rockhill on the 21st day of July, 1906, for the sum of \$300, and therefore the corporation is required to account for that sum only. For the reasons hereinafter stated, we cannot treat the transfer of the property to Rockhill as a sale, and hence we are of the opinion that the corporation is clearly liable under its trust agreement.

But is appellant Rockhill also liable to the respondent? The answer to this question depends upon two things, namely, Rockhill's relation to the corporation, and the character of the transaction by which it obtained title to the land in question. Rockhill's relation to the corporation was that of director and vice president. Whenever a corporation of this state exercises its powers, it must do so through the board of directors, since, under our statute (Comp. Laws 1907, section 324), all corporate powers are vested in and "shall be exercised by the board of directors." No doubt the majority of the board, when regularly convened, may exercise any of the corporate powers in the absence of the minority, and bind such minority if the acts of the majority are not *ultra vires* or in 8, 9 violation of some positive statute, or of some general law, or are void or voidable as against public policy. The minority is not only bound by the acts of the majority, but the minority members are charged with knowledge of all the legal corporate acts that are exercised as aforesaid. If, therefore, the majority acquires any property in trust, every director is charged with knowledge of the trust relation, and, as against the claims of those for whom the corporation became trustee, such member has and can acquire no better right to the trust property than the corporation has. In

this regard, it can make no difference whether the majority of the board of directors directly exercise the corporate power or authorize some agent to do so. The 10 act is still the exercise of a corporate power of which every director as against strangers to the corporation, is assumed to have notice. In 21 A. & E. Ency. L. (2d Ed.), 896, the law upon that subject is stated in the following language:

"As a general rule an officer or director of a corporation is chargeable with knowledge of all matters relating to the affairs of the corporation which he actually knows or which it is his duty to know. Thus, in actions by strangers against an officer or director, the defendant will generally be charged with knowledge of all facts relating to the condition and business of the company which he might have known by the exercise of due diligence, whether actually known to him or not."

This text is sustained by the authorities: *Merchants' Bank v. Rudolf*, 5 Neb. 527; *Greenville Gas Co. v. Reis*, 54 Ohio St. 549, 44 N. E. 271. The last case, in principle, is precisely like the case at bar. In that case the corporation obtained certain bonds in trust. One of the directors subsequently purchased the bonds from the corporation, and in an action against him set up the claim that he knew nothing about the trust agreement; that he purchased the property in good faith for value and without notice. The court, however, brushes this claim aside, and holds that, as a director of the corporation, he must be held as having had knowledge of the trust agreement, although he was absent from the board meeting, and had no actual knowledge that the board of directors entered into the agreement. Under the court's findings in this case, when viewed in the light of the law applicable to them, the transaction by which Rockhill obtained title to the land in question on the 21st day of July, 1906, amounted to no more than to constitute him a trustee for respondent. The property which was therefore held in trust for respondent by the corporation was after the transfer held in trust for her by Rockhill. The transaction of that date between Rockhill and the corpora-

tion of which he was a director, in so far as respondent was concerned, did not amount to a sale of the property for \$300, nor did \$300 represent the best price that 11 could be obtained therefor. While respondent, no doubt, could have ratified that transaction as a sale and insisted upon receiving her share of the \$300 as the price obtained therefor, yet she was not bound to do so and could do just what she did, namely, insist that the sale on the 26th day of July following for \$500 represents the best price obtainable for the land. If the corporation had in fact sold the land on the 26th day of July for \$500, we think no one would seriously contend that it did not represent the best price obtainable, and that respondent could insist that the corporation account to her upon that basis. As we have seen, Rockhill is in no better plight than the corporation, since he simply stands in its shoes, and, in so far as respondent's rights are concerned, is bound by the trust agreement the same as the corporation would be. The corporation could thus discharge its obligation only by complying with the trust agreement, and in doing so, would have to account to respondent for her proportion of the \$500 which was the sale price for the property. Rockhill became a volunteer trustee, and has obtained and holds the fund derived from the sale of the land, and hence we can see no good reason for holding that he should not be required to account to respondent for the amount due her under the trust agreement in accordance with its terms, all of which the law assumes that Rockhill knew.

What we have said also covers the other assignments argued by appellants, and they thus require no further consideration. In our opinion the judgment⁴ of the lower court is right, and it therefore is affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

HAGUE v. JUAB COUNTY MILL & ELEVATOR COMPANY.

No. 2082. Decided February 11, 1910 (107 Pac. 249).

1. **PLEADING—ADMISSIONS—CONCLUSIVENESS.** In an action to enjoin the maintenance of a flume adjacent to plaintiff's property, which he claimed interfered with his easement in a public street, defendant was bound by the allegations of the answer admitting that plaintiff's land abutted upon a public street, and that the flume was in and along said street, and could not contend that the street was never dedicated or established. (Page 294.)
2. **MUNICIPAL CORPORATIONS—OBSTRUCTIONS OF STREETS—ACCESS OVER STREET—OBSTRUCTION BY FLUME.** Defendant maintained a mill flume, with banks at a certain height, for about forty years in a public street, abutting plaintiff's property; plaintiff being able to cross the street by means of bridges without undue inconvenience, until defendant removed the bridges and raised the banks of the flume so as to prevent him from crossing the street from his premises. *Held*, that while defendant was entitled to use the street for a flume, he could not change the height of the banks so as to interfere with plaintiff's rights in the street; and the fact that the street had been abandoned by the public was immaterial upon plaintiff's rights. (Page 295.)
3. **MUNICIPAL CORPORATIONS—STREETS—ABANDONMENT BY PUBLIC—EFFECT ON RIGHTS OF PROPERTY OWNERS.** While the public may abandon a street so far as its rights therein are concerned, such abandonment does not affect the rights of abutting owners to an easement therein for ingress and egress.¹ (Page 296.)
4. **ADVERSE POSSESSION—EXTENT OF RIGHT—ADVERSE POSSESSION OF STREET.** Where defendant had merely an easement in a street for maintaining a flume for milling purposes, he could acquire no more than the perpetual right to maintain the flume for milling purposes, and could not claim, by adverse possession, the legal title of that part of the street so as to entitle him to maintain the flume banks at any height. (Page 296.)
5. **MUNICIPAL CORPORATIONS—STREETS—OBSTRUCTIONS—INJUNCTION—DECREE—CERTAINTY.** In a suit by an abutting owner to enjoin the maintenance of the banks of a flume beyond a certain height in an adjacent street, the decree enjoined defendant from maintaining the banks in front of plaintiff's premises at a height greater than

¹ Sowadzki v. Salt Lake County, 36 Utah, 127, 104 Pac. 111.

nine inches above the present bank at the southeast corner of plaintiff's property, and not exceeding one foot above the present bank at the southwest corner, and not exceeding a height constituting an even grade between such points. The condition of the earth forming the banks of the flume was ascertainable when the decree was entered. *Held*, that the height of the flume as prescribed by the decree could be easily ascertained so as to permanently fix its height, so that the decree was not unenforceable for uncertainty as to the height at which the flume was to be maintained. (Page 297.)

6. MUNICIPAL CORPORATIONS—USE OF STREETS—OBSTRUCTION—REMEDIES OF PROPERTY OWNER—INJUNCTION. The maintenance of the flume so as to prevent plaintiff's access to the street was a nuisance which plaintiff could have abated by injunction; he not being confined to an action for damages to his property. (Page 297.)

Appeal from District Court, Fifth District; *Hon. Joshua Greenwood*, Judge.

Action by A. V. Hague against the Juab County Mill & Elevator Company.

Judgment for plaintiff. Defendant appeals.

AFFIRMED.

A. R. Barnes for appellant.

Thurman, Wedgwood & Irvine for respondent.

FRICK, J.

This was an action to enjoin the defendant corporation from maintaining a certain flume. The court granted the relief by issuing a perpetual injunction, and the defendant presents the record for review on appeal.

The injunction is based upon substantially the following facts found by the court: That the respondent at all times mentioned in the findings was, and now is, the owner of certain parcels of land in Nephi City, Juab county, Utah, which are particularly described. That upon said parcels of land respondent has erected a dwelling house, which he, with his family, occupies as a home, and in connection therewith he has also erected and is using a barn and other

outhouses situate on said land; that the south side of said premises abuts upon a public street, and said dwelling house fronts to the south on the street aforesaid; that in and along the north side of said street along the south boundary line of respondent's said premises there has for many years existed a certain artificial channel for the conveying of water for power purposes to a certain mill owned by appellant and situated on the block immediately west of respondent's premises aforesaid; that said appellant and its predecessors in interest have been, and appellant now is, the owner of an easement in said streets for the carrying of water to said mill for the purposes aforesaid; that said channel is contiguous to the south side of respondent's premises throughout their entire length, and is about four and one-half feet wide and the banks thereof during all the times stated in said findings (which was for a period of forty years or more before the action was commenced) have been maintained at an elevation as follows; on the southeast corner of respondent's premises the banks were maintained at a height of not exceeding nine inches above what the banks are at the present time (the time of trial), and at the southwest corner of said premises they were maintained at a height not exceeding one foot above what they are at the present time, and between said two corners said banks were maintained at a uniform height and at an even grade, and said channel and said banks were used and maintained during all the time aforesaid for the purpose of conveying water to said mill for power purposes; that on or about the 12th day of November, 1907, appellant, by its servants and agents, unlawfully and without authority, and against the consent of respondent, and in violation of his rights, entered upon said artificial channel situated along and contiguous to the south boundary of respondent's premises, and commenced the construction of a wooden flume about three and one-half feet in height and about five feet in width above said artificial channel for the purpose of conveying the water to said mill, and that said appellant threatens to maintain said flume at the height and width aforesaid;

that said flume on the southeast corner and at the southwest corner and along the entire length of respondent's premises is now constructed at a height exceeding the height the same had theretofore been constructed and maintained by appellant and its predecessors in interest to the extent heretofore stated; that prior to the construction of said flume the respondent had constructed bridges across said artificial channel, one of which was used for ingress and egress to and from the dwelling house, and the other was used for the purpose of obtaining access with vehicles and otherwise to the barn and premises of respondent, and that the access to said dwelling house, barn, and outhouses was convenient and in no way affected either the convenient use or value of said premises; that the construction and maintenance of said flume in the manner and condition stated will deprive the respondent of free and convenient access to and enjoyment of the dwelling house, barn, outhouses, and premises aforesaid, and will impair their value, and that said flume as constructed and threatened to be maintained constitutes a perpetual nuisance; that in the construction of said flume appellant has removed both bridges aforesaid, and has thereby destroyed respondent's means of convenient access to the public street in front of said premises, all of which produces an irreparable injury to the premises aforesaid.

Upon substantially the foregoing findings of fact the court made conclusions of law, and entered a decree perpetually enjoining appellant from maintaining the banks of said artificial channel and of said flume in front of respondent's said premises at a height greater than "nine inches above the present bank of the artificial channel at the southeast corner of plaintiff's (respondent's) premises, and not exceeding the elevation of one foot above the present bank of said artificial channel at the southwest corner of plaintiff's said premises, and not exceeding a height constituting and even and uniform grade between said points, and all the portion of said flume now maintained above said elevation is a nuisance to the plaintiff injurious to his prop-

erty, and plaintiff is entitled to have the same abated and removed." Appellant was allowed sixty days in which to reconstruct said flume so as to conform to the conditions imposed in the foregoing decree, and, in case it failed to do so, then said flume was ordered removed, and the nuisance caused thereby abated.

Counsel for appellant has assigned a large number of errors, but in his brief he has grouped them so that it will be necessary to discuss or refer to a few of the original assignments only. Appellant's counsel contends that the alleged street in front of respondent's premises, and where the flume in question is located, never was dedicated nor established as a public street. In view of the averments and admissions contained in appellant's answer to respondent's complaint, this contention is not tenable. 1 In its answer the appellant makes following statements and admissions, to wit: "It (meaning appellant) admits and alleges that said parcels of land (meaning respondent's land) abut upon a public street, which extends east and west in Nephi City, Utah, and is known as Hague Street; that the artificial channel mentioned in paragraph three of the complaint is and was at all times mentioned constructed in, along, and parallel with said street as it extends in front of said lands; that said lands abut upon the north boundary line of said street; that the center line of said artificial channel, throughout its length, as it extends in front of said lands, is about nineteen feet south of said boundary line of said street." At no time was this portion of the answer modified or withdrawn, and hence appellant is concluded by its own solemn statements and admissions that the street in question during the times mentioned in the pleadings was, and at the time the action was commenced continued to be, a public street, and that said artificial channel was constructed and maintained along the south boundary of respondent's premises and in said street. It is true that the answer also contains averments to the effect that the portion of the street in front of respondent's premises and on which the artificial channel was constructed and

maintained had by the public been abandoned as a street, and, further, that appellant had obtained title to said portion by adverse possession. The court heard all the evidence adduced to both parties upon these issues, and determined them against appellant. In view of the evidence upon these issues, when considered in connection with the admission contained in appellant's answer, the court's findings of fact and conclusions of law are clearly right. From appellant's admissions it is clear that respondent in passing from the street to his premises had to pass over or across the channel constructed and maintained by appellant. Respondent's legal right to a reasonably convenient passageway from his premises to the street certainly cannot be questioned nor interfered with by appellant. Nor can respondent prevent appellant from using the channel for the purposes for which it was constructed and used prior to the commencement of the action. The extent of appellant's rights, however, in fluming and maintaining said channel are not unlimited. If the banks or sides of the channel were maintained in the street at a certain width and height during all of the years that the channel has been used by appellant, it may not, for its own convenience, change the channel, if such change interferes with the rights of others. This in legal effect is just what the trial court decided in this case. The court, in effect, found that for the period of forty years or more the banks of the channel in front of respondent's premises had been maintained at a certain elevation; that, when so maintained, appellant could and did obtain the use and benefit of the channel for the purpose for which it was constructed, and that with the banks in that condition the channel did not unduly inconvenience respondent in the necessary use of his premises; that appellant in fluming the channel raised the sides thereof at least three and one-half feet higher than they were before, and thereby injured and unnecessarily interfered with respondent's use of his premises, and hence the court ordered that the sides 2 of the flume be lowered to the original elevation of the banks of the channel. Appellant's contention that the

public had abandoned that portion of the street in which the channel and flume were for the purposes of the decision in this case is immaterial. Of course, the public could abandon that portion of the street and permit appellant to have exclusive use and possession of it as a channel to conduct water to its mill, but in permitting such a use the public did not, and could not, authorize any one to interfere with an abutting owner's rights in maintaining a passageway from the street supposed to be abandoned to his premises over the channel. While the public may abandon a street or highway in so far as it affects the rights of the public therein, such an abandonment, however, will not affect the rights of the abutting owner with respect to the use of an easement he may have in the street for the purposes of ingress and egress to and from his premises. 3
(*Sowadzki v. Salt Lake County*, 36 Utah, 127, 104 Pac. 111.) If appellant had constructed the flume in question four feet high at the time it first constructed the channel and had maintained it at that height during the time mentioned in the findings, respondent, perhaps, could not now complain for the reason that appellant would then have acquired the right so to maintain the flume; but, if appellant should attempt to raise the flume from four to seven feet in height, respondent could prevent it precisely the same as he may prevent it from being raised from approximately one foot above its former location to four feet.

The claim of adverse possession is practically in the same condition as the claim of abandonment. Appellant was given and held possession of a portion of a public street for a special purpose of conducting running water through a certain channel for certain purposes. Having entered upon that portion of the street for the purpose aforesaid, appellant could only acquire the perpetual right to maintain the channel for the purpose of conducting water to its mill, and could not legally claim by adverse possession the legal title to the strip itself. The possession was for 4
a special purpose merely, which, in legal effect, amounted to no more than a right of passage or easement,

and hence the fee remains just where it was when appellant entered upon the strip for the purpose aforesaid.

The contention that the decree is uncertain, and thus not enforceable because the height that the flume may be maintained is not fixed, is not well founded. The height at which the flume may be maintained by the decree is nine inches above the bank as it was at the time of the trial at one corner and one foot above the bank as it was at said time at the other corner of respondent's premises with a uniform grade between those two points. Since those two corners are the extreme limits of respondent's premises, and as the condition of the earth constituting the banks of the channel, as appears from the evidence, was easily ascertainable at the time the decree was rendered, we are of the opinion that the decree is about as certain as 5
under the conditions it could well have been made.

Surely it cannot be seriously contended that the surface elevation of the earth at the points mentioned in the decree was not sufficiently permanent from which any one could ascertain and measure the height at which the court ordered the flume to be maintained. The decree in its terms was certain, and the height that the flume is permitted was easily ascertainable, and, when once ascertained and fixed, would remain so for all time.

The further contention that under the facts respondent is not entitled to injunctive relief, but, if he is entitled to any relief, it is merely damages for injury to his property, cannot be sustained. In view of the findings of the court, all of which are, in our judgment, supported by the evidence, there is no room to doubt that the flume 6
as constructed constitutes a nuisance of which respondent has a right to complain. Upon the other hand, it is apparent that appellant can obtain the full benefit and enjoyment from the flume if constructed as ordered by the court, while, if maintained as now constructed, it will deprive respondent of the full benefit and enjoyment of his property. Under such circumstances, injunctive relief is

always proper, and we think the court fully protected appellant's rights in rendering the judgment it did.

The judgment is affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

HORTON v. ROGHAAR.

No. 2076. Decided March 9, 1910 (108 Pac. 21).

BOUNDARIES—ESTABLISHMENT—ESTOPPEL. Plaintiff, the owner of land in a city block, sold a portion of it to defendant. Neither party knew the location of the boundaries except as described by deed, there being no monuments on the ground, but it was understood that defendant would have the land surveyed when ready to build. Thereafter defendant, on the advice of plaintiff's father who acted for plaintiff, had a survey made by the city engineer, built a house, and erected a fence around the premises according to such survey. Plaintiff's father saw the improvements being made, but made no objection to the boundaries as fixed by the survey. *Held*, that plaintiff was estopped from thereafter asserting that such boundaries were incorrect, it appearing that a change to the line claimed by plaintiff would result in bringing defendant's line so near his house as to materially damage his property. (Page 303.)

Appeal from District Court, Second District; *Hon. J. A. Howell*, Judge.

Action by Alvin E. Horton against Andries Roghaar.

Judgment for defendant. Plaintiff appeals.

AFFIRMED.

Joseph Chez for appellant.

T. D. Johnson for respondent.

McCARTY, J.

This is an action in ejectment brought by plaintiff to recover possession of a strip of ground three feet and nine

inches in width and 125 feet in length, situate in Ogden City, Utah. From a judgment rendered in favor of defendant plaintiff appeals. The material facts in the case are about as follows:

On August 30, 1902, one Joseph H. Horton sold and conveyed to his son Alvin E. Horton, plaintiff herein, a part of lots 5 and 6, block 16, plat "B," Ogden City survey. This land, the dimensions of which were 150 feet north and south by 125 feet east and west, is situated about midway between the northwest and the southwest corners of block 16, and abuts upon Monroe Avenue, a street running north and south in Ogden City. At the time this conveyance was made, the grantor, Joseph H. Horton, owned the balance of the ground in block 16 lying south of the 150 feet mentioned. No survey of any kind was made of the land conveyed by Horton to his son. Nor were there any stakes, fences, or other objects thereon indicating the location of either the north or south boundary line. This land remained unimproved, and was a part of an open field until October, 1906, when Alvin E. Horton (plaintiff and appellant) contracted to sell to one Van Woerkom a strip of ground forty feet wide by 125 feet long off from the north side of the 150 feet which he had purchased from his father. At the same time he sold to respondent a piece of ground forty feet wide and 125 feet long south of and contiguous to the strip that he had contracted to sell to Van Woerkom. The recitals in the deed to respondent, so far as material here, are as follows: "Beginning at a point 287 feet south of the northwest corner of said lot six and running thence south forty feet, thence east 125 feet, thence north forty feet, then west 125 feet to beginning." At the time respondent received his deed there were no stakes, fences, or monuments on the ground, nor on the parcels of ground lying contiguous thereto, to indicate the location of its boundaries. In fact, the record affirmatively shows that neither appellant nor respondent knew the exact, or even approximate, location of the boundaries, except as the same was described by the calls in the deed. On this point appellant testified as fol-

lows: "Q. When you made the deal, you didn't sell any particular forty feet to either of them; just sold each of them forty feet of land in there for so much money? A. Well, I sold them on the north starting from the north end of my land and running eighty feet south. Q. Did you tell them where the land was? A. No, sir. Q. Nothing there to indicate your line; no fence, or anything? A. No, sir. . . . Q. How did you expect them to locate it on the ground? Did you tell them to get it surveyed, or anything of that sort? A. No, I supposed they would get it surveyed when they wanted to locate the ground. Q. That was your supposition when you gave these deeds, when they got ready to build on the land they would get it surveyed? A. Yes, sir. Q. And then go to improving it. That is the way you understood it at that time? A. That is the way I understood it; yes, sir. . . . Q. Didn't Mr. Roghaar (respondent) tell you he was buying the land to build a home on? A. Yes; he told me, I think, that he intended to build." The day after respondent received the deed to his land, appellant left the state and did not return until November, 1907. The evidence, without conflict, shows that during appellant's absence from the state his father was authorized to, and did, attend to his business. Respecting the authority of his father to act for him in matters pertaining to this land during his absence from the state, appellant testified in part as follows: "Q. How did you expect them to get it (referring to the land)? A. Why, I supposed they would have it surveyed. . . . Q. And you went away? A. Yes, sir. Q. And you left your matters, when you did go away, in the hands of your father to attend to for you while you were gone, if any of your matters came up? A. Yes, sir." His father also testified to the same thing. Some time in October, 1906, and after respondent had received a deed to his land, he went to Joseph H. Horton, plaintiff's father, and spoke to him about having the ground surveyed so they would know where the lines and corners of their respective parcels of land were. On this point Joseph H. Horton testified as follows: "Q. Do you

remember of Mr. Roghaar coming to you before he began work at all and speaking to you about where his land was, telling you he wanted to begin and build, and you told him he had better have it surveyed? A. Yes, sir."

In pursuance of the tacit understanding respondent had with appellant at the time he received his deed, as shown by appellant's testimony hereinbefore referred to, and the request made of him by Joseph H. Horton to get the ground surveyed, respondent went to the office of the city engineer of Ogden City, and there made arrangements for a survey of the land as described in his deed. The city engineer, a few days thereafter, surveyed the ground and marked it off by driving a stake at each corner. He also furnished respondent a sketch or plat showing the dimensions and exact location of the boundaries of the land. In making the survey of this land the city engineer used as a starting point a monument established at the northwest corner of block 16, known as one of the city monuments of an official survey made of Ogden City about the year 1889 or 1890, and then followed the calls in the deed. Soon after the survey was made, respondent commenced the erection of a house on the land. The house was built in the center of the lot. This left a vacant space of six feet on either side of the building. There is a door at the south side of the house and a short flight of steps extending from the doorsill to the ground or walk between the house and the south boundary of the lot. After the completion of the house, which cost about \$2500 to build, respondent built a picket fence in front of the house and on the west line of his premises as fixed by the survey, and erected a tight board fence around the other three sides of his lot. During the time the house was in course of erection Joseph H. Horton, who was looking after and attending to appellant's business affairs, lived within three hundred feet of respondent's premises and was in that vicinity almost daily, and observed the work as it progressed from the time respondent began excavating for the foundation until the house and the other improvements mentioned

were completed, and made no objection to the boundaries of respondent's lot as fixed by the city engineer.

About the year 1879, Joseph H. Horton, who was, at that time, the owner of all of lots 5 and 6 in block 16, inclosed them with a fence. The evidence tends to show that this fence was the exterior boundary of said lots as located by a survey made of Ogden City about the year 1878, the stakes and monuments of which have long since disappeared. The fence on the north side of the block is three feet and nine inches north of the north boundary line of the block as fixed by the official survey of Ogden City made about the year 1889 or 1890. Appellant insisted in the court below, and he contends here, that the old fence marks the true boundary line of block 16 on the north, and that therefore the south line of respondent's lot is three feet and nine inches north of where it was located by the city engineer. The evidence shows that if the fence complained of were moved north three feet and nine inches it would practically be against the steps leading from the south door of the house to the walk, and it necessarily follows that this would not only greatly inconvenience respondent in his use and occupation of the house, but the property as a whole would be materially damaged thereby.

Defendant in his answer, among other things, alleged "that plaintiff is, and should be held to be, estopped to claim that he is the owner of any part of the land occupied and improved by this defendant." On the issues tendered by this allegation of defendant's answer, the court found: "That the plaintiff is and should be held to be estopped from asserting that the land surveyed and improved by defendant as hereinbefore stated is not the land mentioned and described in the said deed from plaintiff to defendant." Counsel for appellant contend that the evidence is insufficient to justify this finding. They contend, and it is admitted, that appellant did not know, at the time he executed the deed in question, where the true line was between his own land and the land which he had sold to respondent. Counsel also assert that soon after the deed was executed

appellant left the state and therefore had nothing to do with directing the survey made by the city engineer and knew nothing of the improvements that were made on the land by respondent until after they were completed, and that therefore the principle of estoppel has no application in this case. Appellant testified that when he went out of the state his father, Joseph H. Horton, attended to his business. Joseph H. Horton also testified to the same thing. Therefore appellant is bound by what his father, acting within the scope of his authority, did in the premises. Furthermore, appellant testified that he understood, when he executed the deed to the premises, that respondent would get the land surveyed when he got ready to build upon it. And this is just what respondent did. He went to the 1 office of the city engineer and made arrangements to have the land surveyed. The land as so surveyed was marked off on the ground and the boundary lines clearly indicated by stakes placed thereon by the city engineer. And, as we have observed, appellant's father lived within three hundred feet of the premises in question and was in the immediate vicinity thereof almost daily during the time respondent was building his house and making other valuable improvements. On this point appellant's father testified in part as follows: "I am a contractor and builder; that has been my business for thirty or forty years. . . . I saw the house going up. I saw them dig the cellar. I saw them laying the foundation. I knew it (the house) was going up. I think the house was finished before the fence was built. When the fence had been put up by them I went and had a talk." The evidence, without conflict, shows that no objection was made to the boundaries as established by the city engineer until after these improvements were practically all made. Suppose, for example, that appellant, or his father, had made arrangements with the city engineer to make the survey in question, or had gotten some other party to survey or mark off the land, and respondent had gone on and made his improvements, would it be seriously contended that appellant would not be bound by the bound-

aries thus established? We think not. Appellant is in the same position as though he and the respondent had agreed upon a practical location of the boundary line, and respondent had with the knowledge and acquiescence of appellant gone on and made the improvements mentioned.

Under the facts and circumstances of the case we are clearly of the opinion that appellant is estopped from asserting any claim or right to the strip of land in dispute, and that the court did not err in so finding.

The judgment is affirmed, with costs to respondent.

STRAUP, C. J., and FRICK, J., concur.

TYNG v. CONSTANT-LORRAINE INVESTMENT COMPANY.

No. 2058. Decided March 9, 1910 (108 Pac. 1109).

1. **TRIAL—SUBMISSION OF ISSUES TO JURY—EVIDENCE.** It is error to submit to the jury an issue as to which there is no evidence. (Page 310.)
2. **PRINCIPAL AND AGENT—AUTHORITY OF AGENT—RATIFICATION—QUESTION FOR JURY.** In an action by a purchaser of real estate to recover a deposit of earnest money made with a bank under a contract of sale by correspondence, evidence *held* insufficient to present a question for the jury as to the authority of the bank to execute a formal contract of sale or as to ratification of such contract by defendant. (Page 310.)
3. **VENDOR AND PURCHASER—OPTION TO PURCHASE—EFFECT OF SUBSEQUENT CONTRACT OF SALE.** Where a defendant by letters and telegrams agreed to give plaintiff an option to purchase land, a deposit of earnest money to be made in a designated bank, and the bank, without authority from defendant, executed a formal contract of sale, the terms of the option contract were to be determined by the correspondence, and not by the writing executed by the bank. (Page 312.)
4. **VENDOR AND PURCHASER—REMEDIES OF PURCHASER—RECOVERY OF PRICE—ISSUES.** Where defendant, through letters and telegrams, gave plaintiff an option to purchase land, the price of the option

to be deposited in a bank, and the bank, without authority from defendant, executed a formal contract of sale, and plaintiff, in an action to recover the deposit, based his action on the written contract, he was not entitled to recover on the contract as evidenced by the letters and telegrams. (Page 312.)

Appeal from District Court, Third District; *Hon. Geo. T. Armstrong*, Judge.

Action by Charles Tyng against Constant-Lorraine Investment Company.

Judgment for plaintiff. Defendant appeals.

REVERSED AND NEW TRIAL ORDERED.

Howat & Macmillan for appellant.

Henderson, Pierce, Critchlow & Barrette for respondent.

STRAUP, C. J.

R. A. Rowan, of Los Angeles, Cal., the president of the Constant-Lorraine Investment Company, a corporation, also of that city, in December, 1905, conveyed to it by warranty deed a parcel of ground fifty-three and one-half feet by one hundred and sixty-five feet situate on the west side of State Street, in Salt Lake City, Utah, and in the same deed quitclaimed to it a strip one and one-half feet by one hundred and sixty-five feet adjoining the fifty-three and one-half feet on the south. The title so conveyed to the company was all the title held by Rowan. The strip quitclaimed was occupied by a wall of a building on land of another adjoining the strip on the south. Neither Rowan nor the company ever had possession of the strip occupied by the wall. The deed from Rowan to the company was made subject to a mortgage of \$20,000 covering both strips (55 by 165 feet), and was recorded January 4, 1906. The plaintiff, residing at Salt Lake City, made known to the Equity Investment Company of Salt Lake City, and to Thomas E. Rowan, a real estate agent also of that city, a desire to purchase

property on the west side of State Street, and in the vicinity of the land in question. Thomas E. Rowan was not related to R. A. Rowan. On the 4th day of September, 1907, Thomas E. Rowan, at Salt Lake City, wired R. A. Rowan, at Los Angeles: "Advise cash price west side state taxes prorated whether leased." R. A. Rowan answered the next day: "Will accept fifty thousand dollars. Property now mortgaged for twenty thousand at five per cent. Leases very short. See Kelsey and Gillespie for exact information." On that day Thomas E. Rowan again wired R. A. Rowan: "Responsible party offers one thousand for thirty days' option recommend." R. A. Rowan answered by wire: "Los Angeles, Calif. Sept. 6, 7, 1907. Thos. E. Rowan, Salt Lake, Utah. Will accept one thousand for thirty days' option for property west side State Street. Price fifty thousand subject to twenty thousand mortgage. Balance thirty thousand to be paid in cash on or before thirty days from date. Taxes to be prorated. One thousand to be deposited to my credit immediately with National Bank of Republic, they to notify me by wire. R. A. Rowan."

Upon receipt of this, plaintiff paid to the Equity Investment Company \$1000, who deposited it with the National Bank of the Republic to the credit of R. A. Rowan. The bank thereupon gave the Equity Investment Company the following receipt and writing: "Salt Lake City, September 9, 1907. Received of the Equity Investment Company one thousand (\$1000) dollars as a deposit on account of the purchase price of the following described real property in the county of Salt Lake, State of Utah" describing the parcel of ground 55 feet by 165 feet," which property the Equity Investment Company agrees to buy for the sum of fifty thousand (\$50,000) dollars, payable as follows: Thirty thousand (\$30,000) dollars on or before thirty days from the date of this receipt. The above-mentioned deposit of one thousand (\$1000) dollars to be applied as a part of said payment. The balance of twenty thousand (\$20,000) dollars to be covered by a mortgage for that amount now on the property, which mortgage the Equity Investment Com-

pany agrees to assume and pay. The property to be deeded by a warranty deed free of all incumbrances except aforesaid mortgage of twenty thousand (\$20,000) dollars and the general taxes for the year 1907. The Equity Investment Company agrees to pay their proportion of the said taxes from the date possession is delivered to them. This deposit is made with the National Bank of the Republic, and accepted by them under authority of the following telegram from R. A. Rowan: 'Los Angeles, Calif., Sept. 6, 7, 1907. Thos. E. Rowan, Salt Lake, Utah: Will accept one thousand for thirty days' option for property west side State Street. Price fifty thousand, subject to twenty thousand mortgage. Balance thirty thousand to be paid in cash on or before thirty days from date. Taxes to be prorated. One thousand to be deposited to my credit immediately with the National Bank of Republic, they to notify me by wire. R. A. Rowan.' If the Equity Investment Company does not complete the purchase of said property within the time and manner above specified, then this deposit shall be forfeited to the seller as liquidated damages. National Bank of the Republic, by Frank Knox, Pr."

At the same time and place the Equity Investment Company assigned and delivered the writing to the plaintiff. The assignment was indorsed on the back of the writing. On the 20th day of September, 1907, R. A. Rowan, as president, and P. D. Rowan, as secretary, of the Constant-Lorraine Investment Company, at Los Angeles, executed and mailed to the bank at Salt Lake City a deed to the Equity Investment Company, conveying and warranting to it 53½ feet by 165 feet, and in the same instrument quitclaimed to it 11½ feet by 165 feet, the strip occupied by the wall, being all the title held by it to the property, and being the same and all the title theretofore conveyed to it by R. A. Rowan. On the 9th day of October, the last day of the option, the plaintiff tendered the bank \$29,000, and demanded a deed. The bank tendered him the deed, which was executed and forwarded by R. A. Rowan. The plaintiff refused to accept it on the ground that it contained a war-

ranty for only 53½ feet, and demanded a warranty deed for the entire 55 feet, and as stipulated by the contract executed by the bank. He refused to pay any part of the \$29,000 until such a deed was executed and tendered by the defendant. Such a deed was not tendered.

In a letter from R. A. Rowan to Thomas E. Rowan, the former, on the 9th day of October, wrote: "I wired you yesterday as follows: 'No one ever had authority to sell the property in question for less than fifty thousand, and that is a special price, having always held it before at \$58,500. Can only sell the property as I bought it and giving the same deed I received. Mr. Holloran, the former owner, is acquainted with the particulars of this property, and am sure he will assist you in any way possible.' Of course, you understand that I have never given you the exact frontage of the State Street lot, but have always said it was about fifty-five feet, and I believe that is the exact dimension, although we only have a warranty deed for 53½ feet, and a quitclaim deed for the balance which I am in turn giving to your people. I can only sell what I have, and I will not reduce the price from \$50,000 as I know this is less than it is worth. I hope that you will be able to put the sale through without any trouble."

The contention of the plaintiff is stated in a letter written by his counsel on the 9th day of October, 1907, and addressed to the bank, R. A. Rowan, and the Constant-Lorraine Investment Company. They wrote: "On the 9th day of September, 1907, you gave a contract to the Equity Investment Company to sell the following parcel of real estate, situate in Salt Lake County, Utah, to-wit:" Describing a parcel of ground 55 by 165 feet. "At which time \$1000 was paid upon the purchase price. The contract provides for the payment of \$29,000 more on or before the thirty days from date of the contract. Your contract also provides that you shall furnish a warranty deed to the property, and that the property shall be free of incumbrances except the \$20,000 mortgage. Upon the examination of the title to the property, I find that you can deliver only 53½

feet of the property; that the south $1\frac{1}{2}$ feet is not owned by you or either of you, but is occupied by a wall on the adjoining property on the south. The contract above referred to has been assigned to me. This is to notify you of the facts stated in this letter, and also demand that you return to me forthwith the \$1000 heretofore paid on the purchase price."

The \$1000 was not returned. Thereupon the plaintiff brought this action against the Constant-Lorraine Investment Company, based on an alleged breach of the contract or writing executed by the bank, arising from the failure of the Constant-Lorraine Investment Company to tender and give a warranty deed for the whole of the fifty-five feet as stipulated by the terms of that contract, and its refusal to return the \$1000 paid by plaintiff or his assignor. A judgment was prayed for in the sum of \$1000 and interest. The answer was in effect a general denial. The case was tried to a jury. A verdict was rendered for the plaintiff. The defendant appeals.

The defendant requested the court to direct a verdict in its favor on the grounds, among others, that there was not sufficient evidence to show that the bank had any authority to execute the contract sued on, or to bind either the defendant or Rowan thereto, or that the defendant had thereafter ratified or adopted the contract, and that it was not shown that the contract executed by the bank and declared on was made on behalf, or for the benefit, of the defendant, and if the contract was not the personal contract of the bank but was made in behalf, or for the benefit, of another, it was for the use and personal benefit of R. A. Rowan and not the defendant. The court refused the request, and instructed the jury that before the plaintiff was entitled to recover he was required to prove that the writing or agreement executed by the bank and sued on "was made for and on behalf of, and by the authority of, the said defendant (Constant-Lorraine Investment Company), or that after the making of the same said defendant ratified and adopted said agreement."

Assuming all that R. A. Rowan did in the premises was

done for and in behalf of the defendant and for its benefit, and that the jury were justified in finding that his acts in the transaction were the defendant's acts, still we are of the opinion that there is not sufficient evidence to show that either R. A. Rowan or the defendant had conferred any authority upon the bank to execute the contract in question, or that either thereafter ratified or adopted it. On the face of the contract it appears to be signed by the bank in its own name, and not for or on behalf of either R. A. Rowan, or the defendant. If, however, it was in fact signed by the bank in behalf, and for the benefit of another then the only evidence authorizing the bank to do so is the telegram attached to the contract. That telegram did not authorize it to do anything in the transaction except to receive the payment of the \$1000 and to deposit it to the credit of R. A. Rowan. It did not authorize the bank to make a contract of purchase, nor to stipulate the terms thereof, nor to warrant the title to fifty-five feet, or to any other number of feet. So far as appears by the telegram, the 1, 2 only authority of the bank was that of a mere depository, which was disclosed by both the Equity Investment Company and to the plaintiff. There is no evidence to show that it had any other authority. When the court submitted to the jury the question whether the contract was made "by authority of said defendant," the jury had the right to assume that there was some evidence from which they might make a finding that the defendant had authorized the making of the contract. We find no such evidence.

Neither do we find any evidence that the "defendant ratified and adopted said agreement." So far as the record discloses, the first knowledge that R. A. Rowan had that the plaintiff claimed the right to a warranty deed for fifty-five instead of fifty-three and one-half feet of ground was the telegram sent by Rowan to Thomas E. Rowan, the contents of which were stated in his letter of October 9th, heretofore referred to. But instead of ratifying, he repudiated the authority. Again, on the 24th day of October, the first time R. A. Rowan made any reference to the bank contract, he

again wrote to Thomas E. Rowan: "Am having my attorney look over the contract given by the National Bank of the Republic, and if I am not legally bound to return this sum I will not do so, as I am not morally bound to return it, and in justice should not do so. My telegram was embodied in the contract, and the contract was really based upon the telegram, and from the best advice that I can get at this writing I do not believe that I will be obliged to return it." The correspondence from R. A. Rowan to Thomas E. Rowan after the 9th day of October is, however, not of much significance, for at that time plaintiff, through his counsel, in a letter written by them and heretofore referred to, did not express a willingness to pay the \$29,000 on a tender of a good title by warranty deed to the fifty-five feet of ground, but unconditionally demanded a forthwith return of the \$1000. By that letter the plaintiff regarded the breach complete, and, so far as he was concerned, treated the transaction as ended. Nothing is made to appear that anything subsequently said or done by R. A. Rowan or the defendant in any way influenced his conduct in the premises, or induced him to take any other or different position from that taken by him in his letter of October 9th, declaring a breach and an immediate and unconditional return of the \$1000.

It, however, is claimed by counsel for respondent that R. A. Rowan "knew what was in that receipt, either by having a copy of it sent to him or else by having its contents communicated to him." There is no evidence that a copy was sent him, or that the contents thereof were otherwise made known to him before plaintiff's tender of the \$29,000 and his refusal to accept the tendered deed. If a copy of the contract was sent, or the contents thereof communicated, to R. A. Rowan before that time and before the controversy arose, such facts could readily have been shown. It is argued, however, that he must have known of the terms of the bank contract on September 20, 1907, when he executed the deed to the defendant, because he put the name of the Equity Investment Company in the deed as the grantee,

and that the name of such grantee could not have been acquired except from the contents of the bank contract. The information that it was the Equity Investment Company who paid the \$1000 and who held the option could readily have been obtained by R. A. Rowan from sources other than the contents of the contract. The question is not, Did Rowan know that the Equity Investment Company paid the \$1000 and obtained the option, but, Did he know that the bank had agreed to convey and warrant fifty-five feet of ground, or that it had made any agreement in respect of the terms of the option and purchase? We do not think the evidence sufficient to show a ratification of the contract sued on.

Furthermore, we are of the opinion that the terms of the option are evidenced, not by the writing or receipt given by the bank, but by the telegrams which passed 3 between Thomas E. and R. A. Rowan. In those are found the offer, the acceptance, and the terms of the option. It is unnecessary to determine the legal effect of the contract as evidenced by the telegrams, or whether the defendant complied with the terms thereof by tendering a warranty deed to only fifty-three and one-half feet and a quitclaim deed to one and one-half feet, for the reason that the plaintiff did not declare on that contract, but did declare on the contract made by the bank. The case was predicated alone on the latter contract, and the court submitted it to the jury on that theory, and required them to find, 4 before they could render a verdict for the plaintiff, that the contract signed by the bank was made by authority of the defendant, or that it was thereafter ratified and adopted by it. There being no evidence in support of such issues submitted to the jury, the court erred in refusing to take the case from the jury, and again erred in refusing the defendant's motion for a new trial.

The judgment of the court below is reversed and the case remanded for a new trial. Costs to appellant.

FRICK and McCARTY, JJ., concur.

KURTZ v. OGDEN CANYON SANITARIUM COMPANY et al. (UTAH & OREGON LUMBER COMPANY, et al., Interveners).

No. 2085. Decided March 11, 1910. On Application for Rehearing, April 5, 1910 (108 Pac. 14).

1. **PARTIES—CAPACITY TO SUE.** Every natural person of lawful age has legal capacity to sue. (Page 321.)
2. **DESCENT AND DISTRIBUTION—MORTGAGES—FORECLOSURE—PARTIES PLAINTIFF.** An heir and distributee of a decedent's estate who was appointed in the order of distribution as trustee for the other heirs is a proper party plaintiff to sue for the foreclosure of a trust deed held by such decedent's estate, as assignee, for security, such appointment being made at the request of all the heirs interested in the claim secured. (Page 321.)
3. **EXECUTORS AND ADMINISTRATORS—ORDER OF DISTRIBUTION—COLLATERAL ATTACK.** The court having jurisdiction of all the heirs of a decedent's estate and of the subject-matter, an order of distribution is not subject to collateral attack on the ground that the provision therein appointing one of the distributees as trustee for the other heirs for the foreclosure of a mortgage held by the estate, was in excess of the court's power. (Page 322.)
4. **PLEADING—GROUNDS FOR DEMURRER—MISJOINDER OF CAUSES.** The objection to a complaint that several causes of action have been "commingled in one statement as one cause of action" is not a ground for demurrer under Comp. Laws 1907, sec. 2962, as a misjoinder of "several causes of action." (Page 322.)
5. **PLEADING—COMPLAINT—COMMINGLING OF CAUSES.** The remedy for commingling in one statement several causes as one cause of action is a motion to require plaintiff to separately state his cause of action, as required by Comp. Laws 1907, sec. 2961. (Page 322.)
6. **ACTION—JOINDER OF CAUSES—SEPARATE NOTES COLLATERAL TO SAME MORTGAGE.** The causes of action on separate notes secured by the same mortgage may be joined in one action for foreclosure. (Page 322.)
7. **MORTGAGES—FORECLOSURE—ATTORNEY'S FEES—EVIDENCE AS TO AMOUNT.** Under Comp. Laws 1907, sec. 3505, providing that the attorney's fee in foreclosure proceedings shall be fixed by the court, notwithstanding any stipulation in the mortgage to the contrary, the court may hear testimony of attorneys to aid it in fixing a

reasonable fee, though the mortgage provides a definite amount therefor. (Page 323.)

8. **APPEAL AND ERROR—REVIEW—HARMLESS ERROR.** Evidence, even if improperly admitted, which does not change the result is not prejudicial. (Page 323.)
9. **CORPORATIONS—MORTGAGES—DEBTS SECURED.** A resolution of corporate directors authorized the giving of a note to cover two items of indebtedness due to the payee, and the transfer to the payee of a trust deed, or mortgage, to be held as collateral to secure such note. In the note it was stated that the trust deed was "deposited as collateral security for the payment of this note, and of any and all claims, demands, or other indebtedness due, or not due." *Held*, that the security of the trust deed did not cover another note, subsequently made by the corporation, to the same payee, but not mentioned in the resolution. (Page 325.)
10. **CORPORATIONS—MORTGAGES—DELIVERY.** A corporation executed a mortgage in form of a trust deed to secure bonds to be issued. The bonds were not negotiated, but the corporation becoming indebted for borrowed money on notes indorsed by one of its directors, and such director having died, and his administrator having paid the indebtedness, and the claim against the corporation having been distributed among the heirs of the deceased director, and one of the distributees appointed to collect the claim against the corporation, a note for the amount was given such distributee by the corporation, and the mortgage was transferred as collateral. *Held* that, there being no evidence of fraud in thus securing the debt paid by the corporate director, the mortgage lien is valid, the effect being the same as if it had been executed and delivered for the purpose of securing the corporate debt. (Page 325.)
11. **CORPORATIONS—INSOLVENCY—PREFERENCES TO DIRECTORS.** Where a corporation received the exclusive benefit of the money borrowed for it on the indorsement of one of its directors, a corporate mortgage given to secure the estate of such director, who paid the debt, is not a giving of an unlawful preference to a corporate director.¹ (Page 325.)
12. **CORPORATIONS—INSOLVENCY—EVIDENCE OF INSOLVENCY.** That a corporation is insolvent at the time its mortgage is foreclosed does not show that it was insolvent when the mortgage was given. (Page 327.)
13. **CORPORATIONS—MORTGAGES—FORECLOSURE OF TRUST DEED—PARTIES PLAINTIFF.** Where corporate bonds and deed of trust for security were never actually negotiated, nor delivered for the purpose for which they were executed, but the deed subsequently became

¹ *Wells v. Scott*, 18 Utah, 127, 55 Pac. 81; *National Bank v. Scott*, 18 Utah, 400, 55 Pac. 374.

operative as security for a corporate debt, with which the trustee had no connection, such trustee is not a proper party plaintiff to sue for the foreclosure of the trust deed.² (Page 327.)

ON APPLICATION FOR REHEARING.

14. CORPORATIONS—MORTGAGES—FORECLOSURE—PARTIES PLAINTIFF. A corporation executed a trust deed to secure bonds to be issued. The bonds were not negotiated, but, the corporation having become indebted for borrowed money, the deed and bonds were, by authority of a corporate resolution, delivered as "security for the payment of said money," as evidenced by the collateral corporate note. *Held*, that on default in the payment of such note, the payee could sue to foreclose the trust deed. (Page 329.)

Appeal from District Court, Second District; *Hon. J. A. Howell*, Judge.

Action by J. H. Kurtz against the Ogden Canyon Sanitarium Company, and C. D. Clark, defendants, and the Utah & Oregon Lumber Company, J. H. Winslow, Sr., and the Shupe-Williams Candy Company, interveners.

Judgment for plaintiff. Intervenors appeal.

MODIFIED AND AFFIRMED.

H. H. Henderson, T. D. Johnson and *John C. Davis* for appellants.

Maginnis & Corn and *A. G. Horn* for respondent.

FRICK, J.

The plaintiff brought this action against the Ogden Canyon Sanitarium Company, hereinafter styled "company," and one C. D. Clark to foreclose a mortgage executed in the form of a trust deed in which said Clark was named trustee. The mortgage was delivered to plaintiff as collateral security, as will more fully appear hereafter. All of the other defendants intervened in the action as judgment creditors of

² *Stevens v. Improvement Co.*, 20 Utah, 267, 58 Pac. 843.

said company, and claimed that their judgment liens were prior in right to the mortgage lien of plaintiff. The court found in favor of the plaintiff, declared said mortgage to be a prior and paramount lien, entered judgment and decree of foreclosure, and ordered the land described in said mortgage (which was all the land in which said company had any interest) sold, and the proceeds of sale to be applied first on the debt secured by said mortgage, and the balance, if any, on said judgment liens. The defendants and interveners join in the appeal. The findings of fact fairly reflect the pleadings and the evidence. In view of the questions which are raised by the appeal, we deem it best to state at least the substance of the findings.

The court found: That the company aforesaid, in August, 1905, issued and delivered to one C. D. Clark, as trustee, fifty coupon bonds of one thousand dollars each, bearing six per cent interest, and that on said date, in connection with said bonds, and to secure their payment, said company also executed and delivered to said Clark, as trustee, a certain "deed of trust and mortgage" whereby said company conveyed to said trustee certain lands situated in Weber County, Utah; that said trust deed was duly filed for record, and, on October 13, 1905, was duly recorded in the mortgage records of said Weber County; that said company at various times between December, 1905, and December, 1906, had duly executed and delivered to the Pingree National Bank of Ogden, Utah, certain promissory notes as evidences of loans made by said bank to said company, which together with interest, on August 30, 1906, amounted to the sum of \$14,921.90; that said notes were given for money actually received from said bank, which money was used by said company in improving its property and to pay its debts; that said notes were also signed by certain individuals as makers who at the time were directors of said company, but no part of the money obtained as aforesaid was used by said individuals who signed the notes as aforesaid, but that said individuals, although apparently makers of said notes, were in fact sureties, and the debt in-

curred by the loans from said bank was the sole debt of said company; that thereafter, on or about the 15th day of October, 1905, to secure the payment of the notes and indebtedness aforesaid, said company directed said trustee to deliver to said bank said bonds and trust deed, and that the same were at said time delivered to said bank to secure the payment of said notes and indebtedness; that one T. J. Kurtz, who was a director of said company, personally signed the notes aforesaid, and that he died on the 18th day of November, 1905, and thereafter, on the 11th day of December, 1905, the plaintiff, J. H. Kurtz, a brother and heir of said T. J. Kurtz, was duly appointed administrator of the estate of said T. J. Kurtz, deceased, and that said J. H. Kurtz duly qualified as such administrator and continued to act as such until said estate was fully administered; that during the month of August, 1906, said bank presented its claim evidenced by said notes against the estate of said T. J. Kurtz, the signer thereof which claim was thereafter duly allowed by said administrator, and said allowance was approved by the district court of Weber County, Utah; that at the time of the death of said T. J. Kurtz said company was also indebted to him for moneys advanced by him to it which with accrued interest amounted to the sum of \$1491.54; that on the 30th day of August, 1906, the directors of said company adopted a certain resolution, the substance of which is as follows: That whereas said company was at that time indebted to the Pingree National Bank in the sum of \$14,921.90 for money borrowed by said company; and whereas the trust deed and bonds before mentioned had been delivered to said bank as collateral security for said indebtedness, and said bank now holds the same as security for the loans aforesaid; and whereas T. J. Kurtz during his lifetime, signed the notes held by said bank for the money borrowed from it by said company, and while said Kurtz appeared as a maker of said notes, he in truth was but surety for said company; and whereas said T. J. Kurtz has since died and J. H. Kurtz (the plaintiff) has been duly appointed administrator of the estate of said T. J. Kurtz, deceased,

and the claim of said bank has been presented for payment to said administrator and has been allowed by him, which allowance has been approved by the district court of Weber County; and whereas said company at this time is without funds to pay the debt due the said bank, who is pressing the said administrator for payment, therefore it was resolved that if said administrator will pay the debt owing by said company to said bank the president and secretary of said company are instructed to execute and deliver to said J. H. Kurtz, as administrator, the promissory note of said company for the full amount paid by him to said bank, which note shall be payable in six months from this date and bear eight per cent. interest; that the company consents that upon payment of the debt due to said bank by said administrator the mortgage or deed of trust and bonds held by said bank issued by it be transferred to said administrator, and that in case the interest on said note should not be paid when due the whole of said note shall become due, and that said "J. H. Kurtz as administrator as aforesaid shall hold the notes and obligations issued to the said Pingree National Bank, together with the said bonds and deed of trust, as good and valuable security for the payment of said money." It was further resolved that whereas said company is also indebted to the estate of said T. J. Kurtz in the sum of \$1419.54 that said sum be included in the note to be delivered as aforesaid, and that said trust deed and bonds shall also be held as security for said sum.

The note authorized by the foregoing resolution was duly executed and delivered. It was dated August 30, 1906, and was payable in six months from date. The amount specified in the note is \$16,341.44. This was the amount, with accrued interest, that was due to the bank and to the estate of T. J. Kurtz at that date. In the note for said sum of \$16,341.44, in referring to the security, namely, the bonds and mortgage or trust deed aforesaid, it is stated that they were "deposited as collateral security for the payment of this note and of any and all claims, demands or other indebtedness due or not due." The court found that the mat-

ters contained in the foregoing resolutions were true, and further found that the proposition made by the company to said administrator as embodied in the resolutions aforesaid was by him submitted to the district court of Weber County in which the estate of T. J. Kurtz was being administered, and said court authorized the said administrator to pay the debt owing to said bank by said company and to receive the note of said company with the securities as above stated.

The estate of T. J. Kurtz was distributed to his heirs, eight in number, including J. H. Kurtz, the plaintiff, some time after the order aforesaid was made and before this action was commenced. In the decree of distribution the notes and mortgage upon which this action is based were distributed to the plaintiff as trustee in trust for the other heirs, the amount coming to each being fixed by the court, and the right of plaintiff to maintain this action is based upon that decree. The court further found that the property mentioned in the mortgage was, during the three years preceding the commencement of this action, occupied by said company as a health resort, and that the value of said property during said years was largely speculative; that when this action was commenced said company was insolvent; that prior thereto the "company was a going concern, but was embarrassed at all times to pay its debts for want of ready money, and that said company had property ample to pay its debts, if the same could be converted into cash, and at all times prior to the commencement of this suit was engaged in carrying out the objects for which it was incorporated, and that there was no fraud nor intent to defraud any one connected with the loans of the plaintiff or the Pingree National Bank, but at the time of said transactions it was *bona fide* the intent and effort of all parties to continue the defendant company's business and to extend the time of payment of their due obligations." The court also found that said company was indebted in the sum of \$1500 upon a note executed and delivered to plaintiff December 22, 1906, and that \$1500 was a reasonable attorney's fee

for the foreclosure of the mortgage. The note provided for a ten per cent. attorney's fee. It was also found that the judgments of the interveners, upon which their complaints in intervention were based, were obtained on May 16, 1907, and on August 22, 1908.

The court ordered judgment for plaintiff as follows: (1) For \$16,341.44 and interest on the note of August 30, 1906; (2) for \$1500, with interest, on the note of December 22, 1906; and (3) for \$1500 as attorney's fee. All of these claims were declared prior and paramount to all other liens, and were to be first paid out of the proceeds of the sale of the property. The court found all the affirmative allegations of fraud and wrongdoing alleged by the interveners to be untrue, entered judgment in favor of them for the amounts of their judgments, but declared their liens subsequent and inferior to plaintiff's mortgage lien, and ordered that any surplus proceeds derived from the sale of the mortgaged premises, after paying plaintiff's lien, be divided pro rata among the interveners, and in accordance with the amounts of their judgments. We remark that the plaintiff in his complaint prayed for the appointment of a receiver to take charge of the property and assets of the company. The court duly appointed a receiver, and it seems he is winding up the affairs of the company as an insolvent corporation.

All of the appellants join in the assignments of error. The errors assigned are very numerous, but counsel for the interveners have condensed the grounds upon which they claim either a reversal or a modification of the judgment. The grounds stated by them are, in substance, as follows: That the action should be dismissed (1) because plaintiff is not the real party in interest and has not legal capacity to sue; (2) because the complaint fails to state a cause of action. The grounds upon which it is urged the judgment should be reversed are: (1) Because several causes of action are improperly joined and commingled in one cause of action; (2) because the court erred both in overruling and sustaining certain objections to certain evidence. That

the judgment should be reversed or modified; (1) Because the court erred in allowing the item of \$1500 as attorney's fee; (2) because the court erred in allowing the amount of \$1500 evidenced by the note of December 22, 1906; (3) because the court did not eliminate and deduct from the \$16,341.44 a certain claim amounting to \$256.24, and, finally, because the court erred in not declaring the mortgage or trust deed void as against the claims of the interveners and in not declaring their judgment liens prior and paramount liens. It is conceded, however, that, inasmuch as a receiver has been appointed and the assets of the company are in the custody of the court, the court may have power to direct that all the assets of the corporation be converted into cash and to order the funds so obtained to be distributed pro rata among the creditors of said company.

Passing now to a consideration of the alleged errors, we shall refer to the demurrers first. The company demurred to the complaint upon the grounds that "plaintiff has not legal capacity to sue" and "that the complaint does not state facts sufficient to constitute a cause of action." The demurrer was overruled. The defendant Clark demurred upon the grounds just stated, and upon the further ground "that several causes of action have been improperly united in one cause of action." The interveners attempted to raise the same objections at the trial by objecting to the introduction of any evidence in support of the allegations of the complaint. The first three grounds before stated are based upon the demurrers and the objections of the interveners. The contention that the plaintiff had not legal capacity to sue is clearly untenable. Every natural person of lawful age has legal capacity to sue and nothing to the contrary appeared on the face of the complaint. The objection that he was not the real party in interest and therefore could not maintain the action is likewise without merit. The district court distributed to plaintiff in trust the claims sued on in this action. This, the record shows, was with the consent and at the request of all the heirs interested in said claims. Appellants, however, contend that the court had no

power to distribute the estate of T. J. Kurtz in the manner and for the purpose aforesaid. The court clearly had jurisdiction of both the parties in interest (the heirs) and of the subject-matter (the estate), hence what the court did, if erroneous, was, nevertheless, not void, and is not subject to collateral attack. The objectors in this case could not have assailed the decree of distribution by a direct attack because they were not interested, and if this be so, **3** then, for a much stronger reason, they cannot assail the decree collaterally. The plaintiff clearly had the right to sue in his own name, and all the other heirs are bound by the judgment by reason of their consent to have the plaintiff act for them, if for no other reason. That they are so bound is all that the appellants can require. The court, therefore, committed no error in its rulings respecting the matters just referred to.

The objection that "several causes of action have been improperly united in one cause of action" cannot be sustained. In section 2962, Comp. Laws 1907, it is provided that a party may demur upon the ground "that several causes of action have been improperly united." This provision applies in case a pleader sets forth several causes of action in his complaint which cannot be properly joined in the same action. The demurrer in the case at bar **4, 5** is based upon the ground that several causes of action have been commingled in one statement as one cause of action. This is not a ground of demurrer, but is a ground for a motion to require the plaintiff to separately state his causes of action as provided in the last subdivision of section 2961. (Phillips' Code Pleading, section 201.) True, a party may demur upon the ground of improper union although the causes of action are mingled in one statement, if the union is not permissible under the provisions of the Code. In the case at bar while each of the two notes sued on constituted a cause of action, these two causes of action could properly have been united in one complaint. If the demurrer, therefore, had been based upon the statute, **6** the court still would not have erred in overruling it,

because the causes of action upon the two notes could properly be united in one complaint. Nor did the court err in overruling the demurrer upon the ground that the complaint did not state a cause of action.

The contention that the court erred in overruling appellants' objection to the testimony relating to the attorney's fee is untenable. Under our statute (section 3505), the matter of allowing attorney's fees in foreclosure cases is, to a large extent, left to the discretion of the court.

The court has a right to fix the fee at a lesser sum 7 regardless of a stipulation for a larger one. The court, therefore, was authorized to hear the testimony of other attorneys to aid it in fixing a reasonable fee.

The assertion that the court erred in allowing an attorney's fee is without merit. The note for \$16,341.44 expressly provided for an attorney's fee of ten per cent. We can see no more reason for denying an attorney's fee in this case than in any other of foreclosure. This objection must be overruled.

Nor can the assignment that the court erred in excluding the statement of a certain witness for the interveners of what was said at a particular meeting of the board of directors with respect to what was intended by the board be sustained. Under the issues and in the face of the written evidence before the court, oral evidence upon the subject referred to in the statement of the witness 8 was wholly immaterial, if not improper. Further, even if the statement offered had been admitted, the result still would have to be the same. In either view, therefore, the court's ruling was not prejudicial.

The contention that the court erred in allowing the claim for the \$1500 represented by the note of December 22, 1906, and in rendering judgment for the plaintiff and against the company thereon cannot be sustained. But the contention that the court erred in its findings, conclusions, and judgment that said sum of \$1500 was secured by the mortgage or trust deed, and hence was prior in right to the judgment liens of the interveners, in our opinion, in view

of the undisputed facts, should be upheld. In the resolution by which the trust deed was directed to be delivered to the plaintiff as security, two and only two claims are specifically mentioned. One is the amount which was owing and then due from the company to the bank, and the other was the amount owing and also then due from the company to T. J. Kurtz. These two sums amounted to \$16,341.44, and were evidenced by the note authorized by the board of directors. True, in the note itself the clause which we have heretofore quoted is contained. But either the president or secretary, or some one else inserted said clause in the note. The president and secretary could not exceed the authority conferred on them by the board of directors, and that authority was limited, in that it authorized the mortgage or trust deed to be delivered as security only for the amount specified in the resolutions which became both the guide and authority for the president and secretary. The president and secretary apparently had no other authority to deliver said mortgage except the authority conferred on them by the resolutions. Plaintiff's counsel do not claim that the resolutions conferred authority to deliver the mortgage as security for the \$1500 claimed, but they do contend that the clause in the note referred to was sufficient authority. In addition to this counsel contend that the company having obtained and retained the benefit of the \$1500, and by recognizing the note given as evidence of the same as a subsisting obligation it is estopped from urging that the trust deed and mortgage did not secure that note. As between the plaintiff and the company this argument would have much force, and especially since the corporation is insolvent and is in the hands of a receiver for the purpose of winding up its affairs. But as between the liens of the plaintiff and the judgment liens of the interveners the question is different. The interveners have the right to insist that unless the claims of the plaintiff are in fact secured by a prior lien his general claims must be reduced in right to the general claims of all the corporate creditors. Further, that in view that the corporation is insolvent and its property and assets

are in the hands of a receiver for the purpose of winding up the corporate affairs, all the claims of general creditors must prorate and none should be preferred. In view, therefore, that there is no evidence that the board of directors of the company authorized the president and secretary, or any other officer of said company, to deliver the mortgage or trust deed to plaintiff to secure any other amount than the two specific amounts named in the resolutions adopted by the board of directors, we are of the 9 opinion that the court erred in finding and adjudging that the claim for \$1500 aforesaid was secured by the mortgage and trust deed, and that plaintiff by reason thereof was entitled to a prior and paramount lien for said sum against the mortgaged premises over the judgment liens of the interveners.

Th contention that the court erred in not deducting the amount of the note for \$256.34 from the larger sum of \$16,341.44 cannot be sustained. This amount was clearly included within the resolutions as a debt owing from the company and no good reason is made to appear why said sum should be excluded.

The assignment that the court should have disallowed the entire claim of plaintiff, or, at least, should have declared the mortgage and trust deed as of no effect as against the judgment liens of the interveners is, in our opinion, not well founded. The contention that in securing plaintiff's claim the company while insolvent preferred the claim of an officer or director to the prejudice of the general creditors, in view of the record in this case, cannot be sustained.

There is not a scintilla of evidence of actual fraud 10, 11 or of any attempt by any officer or director as a creditor to obtain an undue advantage over other creditors of the company. The money borrowed from the bank was all obtained for legitimate purposes and was all applied to the use and benefit of the company. The original bonds were never negotiated to any one and thus never became an outstanding liability of the company. The trust deed was, however, executed and thereafter delivered and made effective

for a special purpose, namely, to secure the debt owing by the company to the bank. In delivering the mortgage or trust deed for that purpose it in legal effect was the same as if the mortgage or trust deed had been executed and delivered for the express purpose of securing the bank debt. When this debt was subsequently taken up by plaintiff as administrator of the estate of T. J. Kurtz with the consent of the board of directors of the company, and at their solicitation, and the time of the payment of the bank debt was extended for six months, all of which was evidenced by the note for \$16,341.44, the delivery of the mortgage and trust deed to plaintiff thenceforth constituted security for the debts mentioned in the resolutions, and the mortgage, in legal effect, was the same as if it had been executed and delivered for the purpose only of securing the debts aforesaid.

This also answers the objection that the action was premature because no demand was made as provided in the bonds. The bonds never became of any effect whatever because never negotiated for any purpose.

Nor is the contention that since the trust deed and bonds were delivered as collateral security they should have been sold as such security is usually sold of any force. Under the facts and circumstances of this case it is useless to discuss such a contention. The trust deed was in fact delivered to secure plaintiff's debt. The plaintiff had no right to negotiate the bonds of the company, and if he had it would have been a useless ceremony to offer the paper of an insolvent concern. Plaintiff did the only thing he could do, which was to bring an action in equity to foreclose the mortgage.

Nor can we see wherein the facts of this case bring it within the doctrine that insolvent corporations may not prefer the claims of officers or directors. We are of the opinion that the facts of this case bring it clearly within the rule laid down by this court in the cases of *Wells Fargo & Co. v. Geo. M. Scott & Co.*, 18 Utah, 127, 55 Pac. 81, and *National Bank of the Republic v. Geo. M. Scott & Co.*, 18 Utah, 400, 55 Pac. 374.

Nor is the contention that the company was in fact in-

solvent at the time of the transactions complained of sustained by any proof whatever. True, it is con- 12
tended that since the plaintiff alleged its insolvency when this action was commenced in 1907, and the court so found, that therefore we should assume that the company was insolvent at all times prior to that time. We think that the court's findings on that subject fairly reflect the evidence, and although we are urged to do so, there is no good reason shown why we should disturb the findings.

The contention by the trustee, C. D. Clark, that he was the only proper person to bring suit because he was appointed trustee in the trust deed and bonds, if not already answered by us, is determined adversely to his contention in the case of *Stevens, etc., Co. v. Implement Co.*, 20 Utah, 267, 58 Pac. 843. If there is any distinction between the case at bar and the Stevens Case, *supra*, it is this, that in this case there is much stronger reason for holding that said C. D. Clark was not a necessary party to the action because in this case the instruments in which he was 13
designated as trustee never were actually negotiated nor delivered for the purpose for which they were originally issued but the trust deed subsequently became operative for a different purpose and with that purpose the trustee named therein never had any, nor was intended to have any, connection. In view of the circumstances of this case, Trustee Clark, for all legal and practical purposes, was eliminated from the transaction.

The judgment of the district court is affirmed with the exception of that part which declares the claim of \$1500 evidenced by the note of December 22, 1906, a prior and paramount lien against the property mentioned in the trust deed or mortgage. For the purpose of correcting the error in that regard the case is remanded to the district court of Weber County with directions to modify the conclusions of law and the judgment to the effect that said sum of \$1500 is not a prior and paramount lien against the mortgaged premises, but that such claim should be classed among the general claims against said corporation, and in winding up

its affairs and in distributing its assets among its creditors said claim should prorate with all the other general claims. In all other things the judgment and decree of the district court is affirmed. Each party is required to pay his own costs on this appeal.

STRAUP, C. J., and McCARTY, J., concur.

ON APPLICATION FOR REHEARING.

FRICK, J.

Counsel for all of the appellants join in a petition for a rehearing in which they strenuously insist that we, in legal effect, have made a contract for the parties different from the one they themselves made, and that after making such a contract for them we have permitted one of the parties to pursue a remedy not contemplated by the contract as made. If counsel's assertion were correct, or if in our judgment there were any reasonable ground even upon which to base it, we should not hesitate to grant a rehearing. The whole contention is, however, based upon the resolution adopted by the board of directors of the company upon which respondent based his right to foreclose the mortgage referred to in the opinion. Counsel, in substance, now contend that the mortgage was originally given to secure certain bonds to the amount of \$50,000, due in ten years from August, 1905; that the mortgage was delivered to respondent as collateral security only to secure the payment of the sums of \$14,921.90 and \$1,419.54, aggregating the sum of \$16,341.44, which became due and payable in six months from August 30, 1906; that neither by the terms of said bonds, nor of the mortgage, nor by reason of any other breach, any cause of action had accrued to respondent when this action was commenced, and hence that this action to foreclose was premature. In making this contention counsel entirely ignore the legal purport and effect of the resolution of the board of directors which authorized the execution of the note and delivery of the mortgage upon which this action is grounded. So

that there might be no misconception in this regard we, in the original opinion, quoted that portion of the resolution under which respondent claimed the right to foreclose the mortgage in question. We now, without quoting it again, merely call attention to the language used. 14

The language is not, as contended by counsel, that the mortgage was to be delivered merely as collateral, but the language is that the mortgage was to be delivered as "security for the payment of said money." By "said money" is meant the \$16,341.44 which was made payable in six months from the time said resolution was passed, and every act, word, and deed of the parties to said transaction, as shown by the evidence adduced at the trial, documentary and otherwise, indicate that the property described in the mortgage was intended as a pledge to secure the payment of respondent's claim, and that the respondent should have the usual statutory remedy in case of default of payment that all other mortgagees have under the terms of our statute. In view that the original bonds never were sold or negotiated no other conclusion than the one just stated is permissible. We cannot assume that the parties intended that the respondent should not enjoy the usual remedy to enforce the collection of his claim that all other mortgagees enjoy, when no such intention was indicated in the resolution or agreement, and when a contrary intention is indicated by the language used in the resolution aforesaid. When the property described in the mortgage was in fact pledged to secure the payment of respondent's claim, and when that claim was past due, by what authority can this court say that respondent shall be deprived of his legal remedy to enforce payment? We have always assumed that courts were instituted to enforce contracts and to apply the remedies provided by law for their enforcement. This is all the district court did in this case, and this is all that we have approved in the original opinion. In our judgment there can be no doubt whatever that the board of directors of the company in delivering the mortgage to respondent intended that the property therein described should constitute security for

the payment of the \$16,341.44, and that when that amount should become due and remain unpaid that respondent should have his remedy by the statutory action to foreclose said mortgage, and to sell the property therein described the same as he might have foreclosed any mortgage given to secure a debt under the statutes of this state.

It is also contended that we erred in apportioning costs. As we view the case, no other apportionment would reflect justice. There being no cause shown why a rehearing should be granted, the application should be, and it accordingly is, denied.

STRAUP, C. J., and McCARTY, J., concur.

STATE v. GIBSON.

No. 2097. Decided March 25, 1910 (108 Pac. 349).

1. **LARCENY—GRAND LARCENY.** Comp. Laws 1907, sec. 4384, makes every person guilty of embezzlement punishable in the same manner prescribed for stealing property of the value of that embezzled, and section 4359 makes it grand larceny to steal property valued at more than fifty dollars, and section 4360 makes all other cases petit larceny. Accused was employed to solicit advertising contracts, and within about thirty-eight days collected \$235 from various persons, and appropriated it to his own use; but forty-eight dollars was the largest amount collected from one person at one time. *Held*, that the taking of the \$235 was one embezzlement committed by a series of connected transactions, so as to make accused punishable as for grand larceny. (Page 332.)
2. **EMBEZZLEMENT—AUTHORITY OF AGENT—EFFECT OF EXCEEDING AUTHORITY.** Where accused demanded and received the money appropriated as his employer's agent, and it was paid in the discharge of obligations under advertising contracts which he had solicited for his employer, he was guilty of embezzlement, though he did not have authority to collect money due under such contracts. (Page 333.)

Appeal from District Court, Third District; *Hon. T. B. Lewis*, Judge.

T. B. Gibson was convicted of embezzlement and he appeals.

AFFIRMED.

Mathoninah Thomas and Dale H. Parke for appellant.

A. R. Barnes, Attorney-General, for the State.

STRAUP, C. J.

The appellant was convicted of the crime of embezzlement. Under the statute (Comp. Laws 1907, section 4384), every person guilty of that offense is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled. Grand larceny is committed when the value of the property taken exceeds fifty dollars. (Section 4359.) When the value is fifty dollars, or less, the offense is petit larceny. (Section 4360). It is charged in the information that the appellant embezzled two hundred dollars, the property of the Theater Publishing Company, a corporation. The jury found the appellant guilty of embezzlement "as charged in the information," and that "the value of the money embezzled exceeded fifty dollars."

The evidence on the part of the state tended to show that the appellant was employed by the publishing company to solicit advertising contracts. Between the 12th day of November and the 20th day of December, 1908, he collected from divers persons the sum of \$235.60 due the publishing company upon contracts solicited and procured by him. He failed to account for the moneys so collected, and fraudulently and unlawfully appropriated and converted them to his own use, and left the state for California, where he went under an assumed name, as testified to by himself, "to avoid being located on account of the money I had collected in Salt Lake (Utah) and appropriated." The evidence shows that \$48.60 was the largest sum collected by him from any one person at any one time. In view of such fact, the appellant requested the court to charge the jury that to find

him guilty of embezzlement exceeding fifty dollars it was essential to find that he "had in his possession at one time more than fifty dollars of the money belonging to the Theater Publishing Company," and that he "misappropriated more than fifty dollars at any one time." That is to say, it is in effect urged that if the appellant collected \$48.60 from one customer in the forenoon of a particular day and fraudulently and unlawfully appropriated and converted the money to his own use and spent it, and thereafter and in the afternoon of the same day he collected fifteen dollars from another customer and converted and spent that, and the next day collected and misappropriated another sum less than fifty dollars, and so on until he had in the aggregate, between November 12th and December 20th, collected and received \$235.60 belonging to his employer, and misappropriated and spent the moneys as fast as he collected them, he was guilty only of numerous petit offenses and misdemeanors, but not of any greater offense. The refusal of the court to give the request presents the principal question on the appeal.

We think no error was committed in the ruling. The case is not like that argued to us by appellant 1 where the successive larcenies, each complete and distinct, did not constitute one continuous transaction; or where properties belonging to different persons located at different places were purloined, and where each asportation constituted a separate and distinct offense. (*Scarver v. State*, 53 Miss. 407; *State v. Maggard*, 160 Mo. 469, 61 S. W. 184, 83 Am. St. Rep. 484.) But it is one of embezzlement "committed by a series of connected transactions from day to day" (1 Bishop Crim. Pro. section 398), and shown to be "a continuous offense committed by a trusted servant by means of a series of connected transactions; and in such case a charge of embezzlement on a certain date will cover and admit evidence of the whole." (*State v. Reinhart*, 26 Or. 466, 38 Pac. 822), and is one constituting "in fact and in law a single embezzlement" (*Brown v. State*, 18 Ohio St. 496), and where "the one substantive charge of embezzle-

ment was supported by proof of the receipt at different times of the amount" the appellant "was charged to have embezzled and one conversion of the whole" (*State v. Wise*, 186 Mo. 42, 84 S. W. 954), and falling within the principles stated in the cases of *Jackson v. State*, 76 Ga. 551, *State v. Broughton*, 71 Miss. 90, 13 South. 885, and *Grawatt v. State*, 25 Ohio St. 162.

It is further urged that the appellant is not guilty of embezzlement because it is shown that he was authorized by his employer to only solicit advertising contracts, and not to collect money due or to become due thereon. It might about as well be argued that the appellant was not guilty because he was not authorized to appropriate 2 and convert the money to his own use. The money was demanded and received by him from the customers in the capacity of an agent of his employer, for its use and benefit, and was paid to him by the customers in discharge of obligations owing by them to his employer under the terms of the contracts. The money so paid to and received by the appellant, whether with or without authority from the employer to collect and receive it, became and was the property of his employer, and was received by and intrusted to him as the agent and servant of the publishing company. When he fraudulently appropriated it to his own use, he misappropriated and converted his employer's property, and committed the offense of embezzlement.

We think the judgment ought to be affirmed.

Such is the order.

FRICK, and McCARTY, JJ., concur.

SALT LAKE INVESTMENT COMPANY v. FOX.

No. 2089. Decided March 25, 1910 (108 Pac. 1132).

1. **QUIETING TITLE—FINDINGS—JUDGMENT.** In a suit to quiet title, the court found that defendant was the owner in fee, subject to the interest and claim of plaintiff by virtue of the payment of taxes for certain years, no finding was made that the property was sold or purchased for taxes, and there was no evidence that plaintiff obtained any interest save an equitable lien for taxes paid. *Held*, that a judgment vesting title in plaintiff unless defendant pay to it the amount expended by plaintiff in payment of taxes within a specified time was not warranted, but should have been that on defendant's default to pay the taxes the property should be sold and the proceeds applied to plaintiff's claim, any surplus to be paid to defendant. (Page 338.)
2. **TRIAL—ISSUES—FINDINGS.** In a suit to quiet title, plaintiff alleged that it was the owner and entitled to the land in question, and prayed that its title be quieted. Defendant denied plaintiff's ownership, alleged ownership in himself, and prayed that his title be quieted. *Held*, that a finding that plaintiff had paid taxes on the land which belonged to defendant, and that plaintiff was entitled to an equitable lien therefor, was not without the issues. (Page 338.)
3. **APPEAL AND ERROR—PRESENTATION OF QUESTIONS BELOW.** In a suit to quiet title by one who had paid taxes on the land, a claim that plaintiff should, if given a lien for taxes paid, be charged with rents and profits derived from the property, could not be made for the first time on appeal. (Page 338.)

Appeal from District Court, Third District; *Hon. M. L. Ritchie*, Judge.

Action by Salt Lake Investment Company against Jesse M. Fox.

Judgment for plaintiff. Defendant appeals.

REVERSED.

Gatrell & Johnson for appellant.

Patterson & Moyer for respondent.

STRAUP, C. J.

This is an action to quiet title. The plaintiff alleged that it was the owner, in possession, and entitled to the possession of the land in question; that the defendant claimed an interest therein adverse to the plaintiff, and that he be required to set it forth, and that it be adjudged that it is unfounded, and that the title to the property be quieted in the plaintiff. The defendant denied plaintiff's ownership and right of possession, alleged ownership and right of possession in himself, and prayed that the title be quieted in him. The court found that the defendant, subject to the interest and claim of the plaintiff "by virtue of the payment of taxes from 1895 to 1906," amounting to \$278.13, including interest, was the owner in fee and entitled to the possession of the property. It was further found by the court, that, after the trial and submission of the case, the court made an order that a decree be entered quieting the title in the defendant upon the condition that he, within thirty days after notice of the entry of the order, pay to the plaintiff the sum of \$278.13, and that the defendant failed and refused to pay the same. As conclusions of law the court held that the defendant, prior to the making of the order, "was the owner of and entitled to the possession of the property," and "was entitled to a decree against the plaintiff quieting the title in the defendant" subject to the claim of the plaintiff for the repayment of taxes, and upon the condition that the defendant repay the taxes to the plaintiff as specified in the findings. The court further held "that by reason of the failure of the defendant to pay the said sum of \$278.13 the plaintiff has become entitled to a decree vesting in it the title to said premises, and that such decree is in the nature of a foreclosure of the equitable lien of the plaintiff on said real estate and sale thereof because of said default; that the defendant is entitled to the benefit of an equitable application, as nearly as may be, of the provisions of the statutes relating to the redemption of real estate sold upon execution, to his rights herein, and therefore to the right to redeem said real estate upon the

payment within six months after legal service of a copy of the decree herein of said sum of \$278.13, with interest at the rate of six per cent. per annum from the date of the service of a copy of such decree, and with any other lawful charges that may accrue by virtue of the provisions of section 3262 of the Compiled Laws of Utah of 1907." A decree or judgment was entered by the court that the plaintiff "have judgment as prayed for in his complaint against the defendant quieting the title of the said plaintiff to all of the property described in its complaint, against all claims, pretensions, or demands of the said defendant, . . . on condition, however, that if the defendant shall pay or cause to be paid within six months after service or notice of the entry of the decree the sum of \$278.13, with interest thereon, . . . then, upon such payment, the defendant will be entitled to a decree of this court that he is the owner of and entitled to the possession of the property hereinafter described, and quieting his said title thereto against all claims whatsoever of the plaintiff, but that if the payment of said sum or sums be not paid as herein provided, then the defendant shall stand barred and foreclosed of any and all interest whatsoever in said property." From the judgment so entered, the defendant has prosecuted this appeal.

We are of the opinion that the judgment is not responsive to, and is not supported by, the findings. The judgment was evidently entered, and is defended, on the theory that, in equity, the defendant was not entitled to the relief quieting the title of the property in him until he himself did equity by paying the taxes, together with legal interest. Conceding that the court, under circumstances, could properly so have withheld such relief from the defendant, yet, upon the findings, we find no basis for a judgment in favor of the plaintiff quieting the title of the property in it. No finding is made by the court showing that the plaintiff had title, or right of possession, or that it had acquired or held any right, title, or interest in or to the property, except that it paid the taxes from 1895 to 1906, and that such payments by plaintiff "tended to preserve the property for the defendant."

No finding is made that the property was sold or purchased for nonpayment of taxes, or that any certificate of sale or tax deed was held by plaintiff or was issued, or that the plaintiff otherwise obtained or acquired any title to, or estate in, the property, or any right to possess it. To the contrary, the court expressly found "that the plaintiff has no other right, title, estate or interest in, or claim to the property in question than that set forth in these findings growing out of the payment of the taxes aforesaid." Notwithstanding such findings, the court nevertheless entered a decree that, if the defendant failed to repay the amount of the taxes within six months, "the title of the property should be quieted in the plaintiff against all claims and demands of the defendant," and that the defendant be barred and foreclosed of any and all interest whatsoever in and to the property. There is, therefore, no finding to support the judgment that the plaintiff is the owner or entitled to the possession of the property, or to a "judgment as prayed for in its complaint" quieting the title in itself and decreeing that the defendant has no interest or estate therein. Neither do we find anything in the evidence to justify a finding that the plaintiff had obtained any such title, or right of possession, or other interest, except, as found by the court, an equitable lien for taxes paid. Now, assuming that the court, on equitable principles, could have refused to declare the defendant vested with fee-simple title as against plaintiff's claim or lien, until the defendant repaid the taxes, still, there being no finding and no evidence to show that the plaintiff had title or was the owner or entitled to the possession of the property, and it being found and shown by the evidence that it had no interest in or to the property except an equitable lien for the payment of the taxes, the court was not justified in rendering a judgment that it became the owner and was entitled to the possession of the property upon the defendant's mere default to pay the taxes as required by the court. The court could not thus divest the defendant of the fee-simple title found to be in him, and vest the plaintiff with title found not to be in it. Under the

circumstances, and in view of the findings, we think the judgment which ought to have been entered by the court is that the defendant is the owner of the property subject to plaintiff's claim, and that upon the defendant's default to pay the taxes and discharge the lien as required by the court, to order the property sold under the direction of the court, and the proceeds of sale applied in payment of plaintiff's claim, and the surplus, if any, yielded to the defendant. 1

We think that the contention made by the appellant that the court's findings in respect of the plaintiff's payment of taxes, and declaring it entitled to an equitable lien therefor on the property, were not within the issues, is not well founded. Nor, in view of the record, is the further claim tenable, which is made by the appellant, that if the plaintiff be given a lien for the payment of the taxes it ought to be charged with the reasonable rents and profits derived by it from the property. Such a claim is urged for the first time in this court. No such issue was tendered, and no such claim was made in the court below. It is not shown what the rents and profits were, nor was there any evidence offered or introduced on such a subject. This case has been tried twice, and has twice been here on appeal. We see no merit to this appeal, except the question relating to the form of the judgment as rendered and entered. We think this litigation ought to end, and see no good purpose in remanding the case for a new trial. It is therefore adjudged by this court that the judgment of the court below as entered be set aside, and the case remanded to the trial court with directions to enter a judgment that the defendant is the owner and entitled to the possession of the property subject to plaintiff's lien for the payment of the taxes amounting to \$278.13, together with accrued interest and costs, that the defendant be required to pay the same to the plaintiff, or to the clerk of the district court for its use, within thirty days after the entry of such judgment, and in default thereof the property be sold under the order and direction of the court, and the proceeds of sale applied, first, 2, 3

to the costs of sale, then in payment of plaintiff's claim together with accrued interest and costs, and the surplus, if any, yielded to the defendant; and that the defendant be given the right of redemption as in case of sales under execution. Costs to appellant.

It is so ordered.

FRICK and McCARTY, JJ., concur.

STATE ex rel. HALLEN v. UTAH STATE BOARD
OF EXAMINERS IN OPTOMETRY et al.

No. 2111. Decided April 2, 1910 (108 Pac. 347).

1. **PHYSICIANS AND SURGEONS—OPTOMETRY—REGULATION.** The Legislature has power to define and regulate the practice of optometry, and to that end to prescribe reasonable qualifications to be possessed by those who desire to engage in the practice, and to provide reasonable means by which such qualifications may be ascertained, in order to authorize those qualified to practice, and to prevent those who are not from doing so. (Page 343.)
2. **PHYSICIANS AND SURGEONS—"OPTOMETRY"—CERTIFICATES TO PRACTICE—STATUTES.** Comp. Laws 1907, regulating the practice of optometry in section 1686x1, defines optometry as the employment of "subjective and objective" mechanical means to determine the accommodative and refractive conditions of the eye, and in the three preceding sections created a board of examiners, defining to what extent applicants for a license to practice shall be examined before license, with a proviso that every person then engaged in the practice of optometry shall file an affidavit thereof, and satisfactory evidence with said board, who shall, in consideration of three dollars, issue to him a certificate of registration. Section 1686x5 provides that a failure to apply in time for a certificate shall be a waiver of right thereto. The board furnished blanks to be filled in by applicants under the proviso, stating their names, addresses, length of time and where engaged in refracting. *Held*, that where an applicant complied with the terms of the proviso, filled in the blanks correctly, and filed an affidavit under oath, he was entitled to a certificate, though he used only the subjective method, since while it was the intention to require all those who had no practice to take an examination as to both methods, one method was sufficient under the proviso, as otherwise section 1686x5 would be inoperative. (Page 344.)

3. **PHYSICIANS AND SURGEONS—CERTIFICATE TO PRACTICE—OPTOMETRY—REVOCATION OF LICENSE.** Under such facts the board could not refuse to give him a certificate because of incompetency, under the power given to the board to revoke certificates for gross incompetency, since revocation therefor could be had only on charges and hearing thereon. (Page 344.)

Appeal from District Court, Third District; *Hon. Geo. G. Armstrong*, Judge.

Proceedings by the State, on the relation of Percy Hallen, against the Utah State Board of Examiners in Optometry and its members.

Judgment for relator. The board appeals.

AFFIRMED.

Thurman, Wedgwood & Irvine for appellant.

E. A. Walton for respondent.

FRICK, J.

This proceeding was instituted in the district court of Salt Lake County to compel the Utah State Board of Examiners in Optometry, the appellant in this court, to issue a certificate called a "certificate of registration" to the petitioner, who is respondent here, to authorize him to practice optometry, in accordance with the provisions of a certain act passed in 1907 (Laws 1907, p. 87), and which act is now included in the Compiled Laws of 1907, constituting sections 1686x to 1686x12 thereof.

The material parts of the act on which the petition of respondent is based are, in substance, as follows: Section 1686x provides that it shall be unlawful to practice optometry in the State of Utah without obtaining the certificate provided for in the act. Section 1686x1 defines what shall constitute the practice of optometry in the following language: "The practice of optometry is the employment of subjective and objective mechanical means to determine the

accommodative and refractive conditions of the eye and the scope of its functions in general and the application and adjustment of lenses for the correction of errors of refraction, the relief of eye strain, and the aid of vision." The three succeeding sections create a board to be known as the Utah State Board of Examiners in Optometry, to be appointed by the Governor, and said sections also define the powers and duties of said board, and provide how and to what extent applicants shall be examined before being authorized to practice optometry in this state. There is, however, a proviso to these sections, which, in our judgment, is controlling in this case, which reads as follows: "Provided further, that every person who shall have been engaged in the practice of optometry in the State of Utah on March 14, 1907, shall file an affidavit in proof thereof and satisfactory evidence with said board, who shall make and keep a record of each person and shall, in consideration of the sum of three dollars, issue to him a certificate of registration." Applicants other than those who apply under the proviso must pay an additional fee of ten dollars. Section 1686x5 in substance provides that any person who shall be entitled to a certificate of registration under said proviso, and who shall fail to apply to the board of examiners for such certificate "by July 15, 1907," shall be deemed to have waived the right to a certificate. The other sections of the act are not material in this proceeding.

Pursuant to the foregoing provisions the board of examiners prepared a form of application in which certain blanks had to be filled by the applicants, who applied for certificates under the proviso referred to. These applicants were required to state their names, addresses, the length of time and where engaged in "refracting." The respondent filled out one of those applications, in which he gave his name, his address, and the time he had been engaged in the practice of "refracting." This time he stated was fourteen years, and the place where he was engaged in practice was Salt Lake City. He made the foregoing statements under oath, filed them with the board of examiners, and paid the fee required by the

proviso aforesaid. The board, after the application had been filed for some time, returned the fee to the applicant, and refused to issue to him a certificate of registration, and thus prevented him from practicing optometry in this state.

Upon the foregoing facts, and upon much other evidence, nearly all of which, in the view we take of the case, is entirely immaterial, the district court issued a writ of mandate, directing the board of examiners to issue and deliver to the respondent a certificate of registration, authorizing him to practice optometry in this state as an applicant under the proviso to which we have referred. The board presents the record to this court for review on appeal.

It is contended that the district court erred in issuing the writ of mandate: (1) Because the respondent on the 14th day of March, 1907, was not engaged in the practice of optometry as defined by the act aforesaid; and (2) because he did not furnish to the board of examiners satisfactory or any evidence that he was so engaged. For these reasons, among others, it is contended that the respondent was and is not entitled to a certificate of registration. It is not claimed that the respondent did not correctly and truly answer all the interrogatories required to be answered by him in the blank application furnished him by the board; but it is contended that, in propounding other questions to the applicant by one or more of the members of the board, it was disclosed that the respondent was not engaged in the practice of optometry as the same is defined in section 1686x1, *supra*, because he used and applied subjective mechanical means only, while said section provides that "the practice of optometry is the employment of subjective and objective mechanical means . . . for the correction of errors of refraction, the relief of eye strain, and the aid of vision." In view of the language just quoted, it is contended that no one who on March 14, 1907, used and applied only one of the mechanical means aforesaid was legally qualified to practice optometry in this state. It is further contended that the statement made by respondent in his affidavit "that, on the 14th day of March, 1907, he was a

practicing optometrist in the State of Utah," by his subsequent admissions, to at least one member of the board, with regard to the mechanical means used and applied by him in the "adjustment of lenses for the correction of errors of refraction," was shown not to be true. That is, that it was made to appear that respondent was not practicing optometry within the purview of the language of the section we have quoted.

No one can doubt the power of the Legislature to define and regulate the practice of optometry, and, 1
to that end, to prescribe reasonable qualifications to be possessed by those who desire to engage in the practice, and to provide reasonable means by which such qualifications may be ascertained, in order to authorize those qualified to practice, and to prevent those who are not from doing so. We are of the opinion that it was the intention of the Legislature to require all those who were not engaged in the practice of optometry in this state on March 14, 1907, to pass an examination and prove their fitness and qualifications to use and apply both subjective and objective mechanical means to aid them in the "correction of errors of refraction, the relief of eye strain, and the aid of vision." The board of examiners were thus by the act authorized to examine applicants, not then engaged in the practice, with respect to their knowledge and proficiency in the application and use of both the means aforesaid, and to withhold a certificate from the applicants if the board was satisfied that the applicants were not so qualified. But we find no warrant in the statute to authorize the board of examiners to examine or pass upon the qualifications of any one who was engaged in the practice of optometry on March 14, 1907, provided such person made application for a certificate of registration "by July 15, 1907," and furnished proof of the fact that he was engaged in the practice of optometry at the time aforesaid. To make such proof is all that the law required of such applicants, and this is all that the board of examiners could require from them. If the Legislature had intended that those who were engaged in the practice of optom-

etry on March 14, 1907, should nevertheless satisfy 2
the board of examiners that each and every applicant
shall use and apply both subjective and objective mechanical
means for the purposes mentioned in the statute, then the
proviso under which such persons were entitled to certificates
is meaningless, and section 1686x5, which provides that in
case application for a certificate is not made within the time
specified, the right to such a certificate under the proviso
shall be deemed waived, is a useless appendage to the act.
If all applicants, those who were then engaged in as well as
those who desired to enter upon the practice of optometry
thereafter, were to be required to pass an examination and
prove themselves proficient in the use of both the mechanical
means specified in the act, then both the proviso and the
provisions of section 1686x5 are without force or effect,
and the applicants under the proviso had nothing to waive.

Power is also conferred upon the board of examiners to
revoke certificates for certain causes, one of which is gross
incompetency. In order to revoke a certificate upon this
ground, however, there must be a charge filed with the board,
and after due notice to the accused, a hearing must be had,
at which he must be confronted by the witnesses against
him, and be permitted to produce any competent evi-
dence in his favor. What the board in effect sought 3
to do in this case was to adjudge the applicant incom-
petent in advance of any charge against him, and without
a hearing, and before complying with the law, which is
based on the presumption that those who were engaged in
practice when the act went into effect were qualified to do
so, and were entitled to certificates which could, however,
be revoked in the manner aforesaid.

It is our duty to give effect to all the provisions of the
act; and, if we do so in this case, it is clear to us that the
Legislature intended that the proof of the fact that an ap-
plicant was engaged in the practice of optometry on March
14, 1907, was sufficient evidence of his qualifications to
practice under the act in question, provided the applicant
made his application and proof within the time, and paid

the fee required by the act. In so far as the act applies to those who were then engaged in the practice, we think that all that was required of them was to make proof that they were engaged in the practice of what was then commonly known as constituting the practice of optometry, by the use and application of either one or both of the mechanical means aforesaid; and, when such proof was made, the applicants were entitled to be placed upon the records required to be kept by the board of examiners as licensed practitioners. We are of the opinion that, under the undisputed facts, the respondent furnished the evidence required by the act, and was thus entitled to a certificate from the board of examiners. The district court, therefore, committed no error in granting the writ of mandate.

The judgment is affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

STATE v. BARKER.

No. 2018. Decided April 2, 1910 (108 Pac. 352).

WATERS AND WATER COURSES—CHANGE OF CHANNEL—USE OF OLD CHANNEL—FISH PONDS. Where a public stream, abounding in fish valuable for food, flowed across defendant's premises, he was entitled to change the course of the stream over such premises and construct fish ponds in the old bed, without injury to public or private interests, or interfering with the fish in the stream, permitting the water diverted to his fish ponds and hatchery to run undiminished and unpolluted back into the stream. (Page 348.)

Appeal from District Court, Second District; *Hon. J. A. Howell*, Judge.

Action by the State against Joseph Barker to abate an alleged nuisance.

Judgment for defendant. State appeals.

AFFIRMED.

A. R. Barnes, Attorney General, for the State.

J. D. Skeen for respondent.

McCARTY, J.

This is an action by the State of Utah to abate an alleged nuisance, consisting of a fish hatchery and screens, constructed and maintained by respondent across what was once the natural channel of Huntsville Spring Creek, a tributary of Ogden River, and to enjoin respondent from maintaining said screens and hatchery. From a judgment rendered in favor of respondent, the State of Utah prosecutes this appeal.

The appeal is upon the judgment roll, and the only error assigned is that the conclusions of law and decree are not justified or supported by the pleadings or the findings of fact. It appears from the allegations of the complaint and answer, and from the findings of fact, that respondent is the owner of certain real estate in Weber County, consisting of about ninety-seven acres. Huntsville Spring Creek, which contains about fifteen second-feet of water, flows in a general westerly course across respondent's premises. This creek is a natural feeding and spawning ground of valuable fishes, and is fed by a large number of small springs arising on respondent's premises. In addition to the small springs that arise on these premises, there is a large spring known as the "Knudson Spring," which contains a little more than one-half second-foot of water, which flows through a natural channel into the old creek bed of Huntsville Spring Creek. The natural channel of Huntsville Spring Creek across respondent's premises was very crooked, and by reason thereof the value of the land was materially lessened for ordinary purposes. In the year 1906 respondent constructed a dam across the main channel of Huntsville Spring Creek near the east boundary line of his land, and excavated a straighter

channel of sufficient size to carry all the waters of the creek across his premises, and connected it with the old channel near the west end of his land, and has utilized the old channel for a series of fish ponds and a fish hatchery, and has placed in it a large number of screens to prevent the fish in his ponds from escaping to the waters of Huntsville Spring Creek, which are conceded to be public waters of the State of Utah, and to prevent the fish in Huntsville Spring Creek from entering his private fish ponds. The respondent also cleaned out the Knudson spring, excavated ponds, and placed screens at regular intervals in the channel leading from the spring, making it suitable for the propagation and growth of fish. The respondent also, by means of ditches, diverted from the main channel of Huntsville Spring Creek to his private fish ponds a small stream of water, which ran undiminished and unpolluted back into the main channel.

The court made findings in accordance with the facts as we have stated them, and further found "that the new channel constructed across defendant's [respondent's] land is, and at all times mentioned in the complaint has been, open and unobstructed, and is practically as good as the old channel for the feeding and spawning of fish," and further, "that the spring known as the 'Knudson Spring' was, prior to the time defendant [respondent] converted the same into private fish ponds, shallow and unsuitable for the feeding or spawning of fish, and was not inhabited by fish valuable for food." The court also stated in its findings of fact that it was "not satisfied that the screens now in the various streams upon said premises are properly constructed and maintained to accomplish the purposes for which they were intended." As conclusions of law the court found that the respondent had a legal right to change the channel of Huntsville Spring Creek where it crosses his premises, the legal right to use the old channel for private fish ponds, the legal right to clean out the Knudson spring and use it for a private fish pond, and the legal right to divert a reasonable amount of water from Huntsville Spring Creek to his pri-

vate fish ponds, provided he returned it to Huntsville Spring Creek unpolluted and undiminished to any appreciable extent. The court also found, as a conclusion of law, "that a qualified and disinterested person should be named as commissioner to examine and superintend the construction of screens at all points on said premises where fish may, if not prevented, pass from the public waters of the State of Utah to the private fish ponds" of the respondent.

A decree was entered in accordance with the foregoing findings of fact and conclusions of law, and the action dismissed. The decree, however, provides that the court shall retain jurisdiction of the suit for the purpose of exercising supervisory control over the commissioner appointed to superintend the construction of and placing in the ponds and streams mentioned screens necessary to prevent the fish in the Huntsville Spring Creek from entering the private fish ponds of respondent. The contention made on behalf of the state is that where the channel of a public stream, which is a natural feeding and spawning ground of valuable fishes, crosses a person's premises such person cannot lawfully construct a new channel and turn the waters of the public stream into such channel as it crosses his premises, and then utilize the old channel for private fish ponds, regardless of whether the diversion of the stream from the old and natural channel into the new and artificial is in any way detrimental to the feeding, spawning, and growth of fish therein.

We think this contention is unsound. While a person across whose premises a public stream, abounding in fish valuable for food, flows, may not, because of his ownership of the premises, place dams, screens, or other substances in the channel that would tend to interfere with the passage of fish up and down the stream, or do any other act therein prohibited by the fish and game laws of the state, yet we know of no reason why such person should not be permitted to change the course of the stream across 1 his premises, where as in this case, neither public nor private interests are affected by such change. The question

of whether a party across whose land a public stream stocked with fish flows may or may not change the course of the channel of such stream over his premises for the purpose of improving his land and making it more valuable for agricultural or other purposes, where such change would render the stream less suitable for the feeding, spawning, and raising of fish, we are not called upon to determine, as no question of that kind is presented by this appeal. The court having found that the new channel across respondent's land has not interfered, and does not interfere, with the spawning and feeding of fish, that the Knudson spring, prior to the time respondent converted it into a fish pond, was unsuitable for the feeding or spawning of fish, and that the water diverted by respondent from the main channel of Huntsville Spring Creek to supply his fish ponds and hatchery runs undiminished and unpolluted back into the creek, no judgment other than that rendered by the court would be permissible in the case.

The judgment is therefore affirmed, with costs to respondent.

STRAUP, C. J., and FRICK, J., concur.

LOCHWITZ et al. v. PINE TREE MINING & MILLING COMPANY.

No. 2092. Decided April 5, 1910 (108 Pac. 1128).

1. CORPORATIONS—OFFICERS—POWERS OF PRESIDENT. Under Comp. Laws 1907, secs. 315, 324, providing that the corporate powers of a corporation shall be exercised by the board of directors, which shall not be less than three nor more than twenty-five, etc., the president of a corporation has ordinarily only the powers of a director, or such as may be directly conferred on him by the board of directors. (Page 355.)
2. CORPORATIONS—OFFICERS—BOARD OF DIRECTORS—QUORUM. Under Comp. Laws 1907, secs. 315, 324, providing that the corporate powers of a corporation shall be exercised by the board of directors,

consisting of not less than three nor more than twenty-five, and that a majority of a quorum when duly assembled may bind the corporation, a quorum of the board of directors must act as a unit when discharging or authorizing any one to execute corporate powers. (Page 355.)

3. **CORPORATIONS—OFFICERS—POWERS.** Where the president and secretary of a corporation entered into an option contract for the sale of corporate property for a fixed price payable in installments, pursuant to the authority of the board of directors to the president and secretary to contract for the sale of the property for a specified price, the president alone had no authority to extend the time of the payment of any installment; the contract making time of the essence. (Page 356.)
4. **CONTRACTS—OPTION CONTRACTS—MODIFICATION—EFFECT.** Where an option contract for the purchase of property for a fixed price payable in installments on designated dates, made time of the essence, an extension of the time of the payment of the first installment is a modification of an executory agreement, and, in effect, the entering into of a new agreement. (Page 357.)
5. **CORPORATIONS—RATIFICATION OF UNAUTHORIZED ACT.** Where a corporate power is required to be exercised in a particular manner, a ratification of an unauthorized exercise of the power must be effected in such manner. (Page 357.)
6. **CORPORATIONS—ACTS OF OFFICERS—RATIFICATION.** The president and secretary of a mining corporation, pursuant to authority from the board of directors, made an option contract for the sale of corporate property for a specified price payable in installments on designated dates, and made time of the essence. The president alone extended the time for the payment of the first installment. The secretary was informed of the modification, and he then wrote to the president, who was absent from the state, inquiring about it. Nothing further was done by any one until the purchaser in the option contract learned that the corporation had refused to recognize the extension of time. *Held*, that the act of the president was not ratified, and the corporation was not bound thereby. (Page 357.)

Appeal from District Court, Third District; *Hon. Geo. G. Armstrong*, Judge.

Action by Adolph Lochwitz and another against the Pine Tree Mining & Milling Company.

Judgment for defendant. Plaintiffs appeal.

AFFIRMED.

Allen T. Sanford for appellants.

Smith & Price for respondent.

FRICK, J.

The appellants brought this action against the respondent, a corporation, to recover damages for an alleged breach of contract. In February, 1907, appellants and respondent entered into a contract whereby it was agreed that appellants should take possession of respondent's mine and develop certain specified portions thereof by working a certain number of men for a specified time. For all ores mined and sold appellants were to allow respondent a certain per cent., denominated "royalty." As a part of the foregoing agreement, appellants were also given an option to purchase respondent's mine at the agreed price of \$75,000, payable as follows: \$25,000 on or before the 1st day of September, 1907, and \$50,000 on or before the 1st day of December following. Time was made of the essence, and in case the \$25,000 payment was not made at the time specified, or within five days thereafter, appellants, by the terms of the contract, were to forfeit all rights thereunder, including the right or option to purchase. Appellants, in effect, alleged in their complaint that in June, 1907, the option agreement aforesaid was modified by the president of respondent by extending the time of making the first payment; that respondent, after granting said extension, refused to comply with the contract as modified, excluding appellants from the mine, preventing them from marketing certain ores which they developed and which were of great value, forfeiting their rights under the option contract, and thus committing the alleged breach. The respondent, in its answer, denied that the contract was modified as alleged and further, affirmatively averred that, if the president of respondent did make the alleged modification, he did so without authority, and hence the modification, if made, was not binding on the corporation.

As we view the case, the questions for determination are: (1) Was the contract modified by the president of respondent and as contended by appellants? (2) If so, did the president act by virtue of authority so as to bind respondent? And (3) if the president acted without authority, was his act thereafter ratified so as to bind respondent? We shall, therefore, confine ourselves to a statement of the facts relating to the foregoing propositions.

The evidence adduced at the trial in support of the first proposition is as follows: One of the appellants, in stating what the president of respondent, in granting the extension of time, said, testified as follows: "Well, he said, 'I will extend you the \$25,000 payment, the first payment, to the last, so when it comes due, the last payment, you will have to pay \$75,000.' . . . He said, 'Yes, by the way, it might be such a thing that ought to be made in writing.' I said: 'Mr. Savage, I am no attorney. . . . If there is any writing to be done, you are the president. You and the secretary have the papers fixed up.' . . . So just before he went away I said: 'Now, Mr. Savage, we are both old people. Something may happen to one; something may happen to the other. I don't want to hurt you, and I am sure you don't want to hurt me.' . . . I said, 'Won't you tell your secretary about the extension, and please go to my attorney, Mr. Henry C. Lund, and tell him also that you have extended the time of the \$25,000 payment for ninety days longer?' He said, 'I will do it.' We parted." This witness said that he did not ask for the extension; that he "didn't have gall enough to ask him (the president) for it." The extension was thus granted voluntarily by the president.

The "last payment" mentioned in the foregoing statement referred to the \$50,000 payment due on or before December 1, 1907. The effect of the extension would thus have made both payments due at the same time and on the date last mentioned, and would, as appellants contend, have given them three months longer possession of the mine. Appellants did not obtain the record of the proceedings of respondent.

ent's board of directors showing the authority for entering into either the original option agreement or the alleged modification thereof. They, however, called the president of respondent as a witness for the purpose of showing his authority to act, and his testimony, in substance, is that there was a meeting of the board of directors at which the authority to enter into the original agreement was by a resolution duly passed conferred upon the witness and the secretary of the company, Mr. Price; that in the resolution appellants were mentioned as the parties with whom the president and the secretary might enter into a contract, but nothing was mentioned in the resolution with regard to the terms of sale except that the consideration was to be \$75,000; that the terms were not set forth in the resolution because it was not then known what terms the president and secretary would be able to obtain, and hence the matter of terms was left for them to agree upon; that there never was a meeting of the board of directors at which the modification of the contract was either discussed or passed on; that the board of directors conferred no authority upon the witness except what was contained in the resolution aforesaid.

The evidence of ratification, in effect, is that some time early in July one of the appellants went to the office of Mr. Price, the secretary of respondent, to pay him respondent's share of the proceeds derived from the sale of ore taken from the mine under the contract; that at that time the witness informed Mr. Price that the president of respondent had granted an extension of ninety days' time, and Mr. Price said he knew nothing about it. The witness then repeats what he told Mr. Price, as follows: "I said, 'Strange! Mr. Savage (the president) was out there (at the mine) a month ago, and he volunteered to give me that (the extension) without even asking for it. . . . Be kind enough to look into it and find out.' Something like that I said, and he (Mr. Price) said he would."

Nothing more appears to have been done or said about the alleged ratification until August 29, 1907, about two days before the first payment was due by the terms of the

original contract. About this time appellants sold and transferred their interest in the option contract to one Schenck upon the representation by them that they had obtained an extension of ninety days in which to make the first payment. One of the appellants again went to see Mr. Price, the secretary, to inform him that they had sold their interest in the option contract. The question then came up about the payments, and, the witness again claimed that an extension of time had been granted by Mr. Savage, the president of respondent. Mr. Price again said that he knew nothing about it. Mr. Price, then, in the presence of the witness, dictated a letter to Mr. Savage, the president, who was, and for some time prior thereto had been, absent from the State of Utah; and, as the witness says, Mr. Price did this to "find out something about it." The witness, in relating what he said to Mr. Price at that time, proceeds, as follows: "I said: 'You can do whatever you please. You can't fool me with nothing. I know all about it.'" With respect to what Mr. Price wrote to Mr. Savage, the witness says: "As near as I can remember, he said, 'Mr. Lochwitz (the witness) is claiming an extension, and, if so, I do not know anything about it.' Or at least he didn't know anything about it. . . . He said, 'I am going to send that letter to-day, and we are going to get back the answer from Mr. Savage in about four or five days.'" Counsel for appellant then asked the witness: "Calling your attention to the dictation of that letter was there anything said with reference to Mr. Savage letting him know whether he had made such an extension?" The witness answered: "Yes, sir; he said to let him know." The witness further said that he heard no more about the matter until he learned that respondent had entered into a contract with some one else and had refused to recognize the extension of time.

Upon substantially the foregoing evidence, the court, upon respondent's motion, granted a nonsuit; and in making the ruling the court said, "No authority is shown for the making of the extension." Counsel for appellants strenuously insists that in view of the evidence the president of respondent

had the authority as a matter of law to grant an extension; that he granted it; and that, if the evidence failed to show authority on the part of the president to grant an extension, the respondent is nevertheless, bound, because the president's act was ratified by the secretary of the company. Are these contentions sound? The power of corporate officers or directors to act as the agent of the corporation may be affected in three ways: (1) By the statutes of the state in which the corporation is created; (2) by the articles of incorporation; and (3) by the by-laws of the corporation. If not so regulated, the exercise of the corporate powers are controlled by the common law. In this state, by virtue of section 324, Comp. Laws 1907, "the corporate powers of a corporation shall be exercised by the board of directors." By the same section it is provided that, if the number of directors constituting a quorum is not fixed by the articles of incorporation, a majority of the board of directors shall constitute a quorum, a majority of whom, when duly assembled, may bind the corporation by their acts. Section 315, among other things, provides that the board of directors of any corporation shall not be less than three nor more than twenty-five, and a quorum shall not be less than one-fourth of the whole number of directors. Under our statute, therefore, the president, as such, of a corporation, has ordinarily only the powers of a director, or such as may 1, 2 be directly conferred upon him by the board of directors. Again, under statutes similar to ours, a quorum of the board of directors must act as a unit when discharging or when authorizing any one to execute corporate powers. (4 Thompson on Corps. 4619; 10 Cyc. 775.) The rule is well and tersely stated in Cyc. in the following language:

"The board of directors to whom the authority to bind the corporation is committed is not the individual directors scattered here and there, whose assent to a given act may be collected by a diligent canvasser, but it is the board sitting and consulting together in a body. Individual directors, or any number of them less than a quorum, have no authority as directors to bind the corporation. And this is equally the rule, although the director who assumes to do so may own a majority of the shares."

Nothing is made to appear from the record with respect to how many directors constitute the board of respondent. All that does appear is that there were at least four directors chosen at some time. Nor does it appear how many of the board constitute a quorum. As we have seen, it does appear, however, that the directors held a meeting at which they authorized the president and secretary of respondent to enter into the original option contract with appellants, and that the board took no further action upon that subject. The evidence is also beyond dispute that the president alone volunteered to grant appellants the alleged extension. This was therefore an attempted modification of an existing executory agreement. In legal effect it was entering into a new agreement. Applying the law to the undisputed facts, if we assume that what the president did amounted 3 to an extension of time in fact, yet we think it is clear that as a matter of law such an extension was not binding upon the respondent because the president was legally powerless to grant it. But counsel for appellant seriously contends that the acts of the president were ratified and thus became binding on the corporation. We have set forth the effect of all the evidence upon the question of ratification. We are of the opinion that as matter of law it falls far short of establishing any of the elements of a ratification of an executory contract or agreement. As we have pointed out, under our statute the powers of the corporation must be exercised by a quorum of the board of directors when assembled as a body. The president, therefore, could not make a binding contract nor modify an existing one unless authorized to do so by such a quorum. In the resolution testified to by the president it required the joint act of the president and the secretary to make a binding contract. This they did by entering into the original option agreement. Nothing is made to appear from which it could be inferred that the president and the secretary could enter into more than one agreement with appellants. But, assuming that the powers of the president and secretary were not exhausted when they had executed the original option

contract, yet the modification or new agreement was 4
not made by the president and secretary, but was
made by the president alone. The resolution of authority
gave him no power to act alone. His individual act was,
therefore, of no binding force or effect upon respondent.
Did the secretary ratify the act of the president? Did he
have the power to do so without acting jointly with the
president? The general rule that, where a corporate power
is required to be exercised in a particular manner,
a ratification of an unauthorized exercise of such 5
power must, in order to bind the corporation, be ef-
fected in the same manner that is required of the exercise
of the original power. In 3 Cl. & Marsh. on Private Corps.
the rule is admirably stated, at page 2190, in the following
words:

"If it is necessary that authority to do a particular act or enter
into a particular contract shall be given in a certain mode, either by
reason of a mandatory charter or statutory provision, or by reason of
the common-law rule, ratification of such act or contract must be in
the prescribed form or mode. 'The ratification of an act, done by one
assuming to be an agent, relates back, and is equivalent to prior
authority . . . When, therefore, the adoption of any particular
form or mode is necessary to confer the authority in the first instance,
there can be no valid ratification except in the same manner.' Thus,
if a corporation can only authorize a particular act or contract by a
power under seal, or by formal vote, ratification of such an act or con-
tract must be under seal or by a formal vote, as the case may be."

See also *Despatch Line, etc., v. Bellamy, etc., Co.*, 12 N.
H. 205, 37 Am. Dec. 203; *Blood v. La Serena, etc., Co.*, 113
Cal. 221, 41 Pac. 1017, 45 Pac. 252.

Neither the facts nor the law, therefore, warrant the con-
clusion that there was any intention or effort to formally
ratify the act of the president in modifying the original
agreement. Is the evidence such as would warrant a jury
to find that Mr. Price, as the secretary of the com-
pany, ever manifested an intention to or did ratify 6
the president's act. We think not. All that there
is in the evidence is that Mr. Price was informed by one
of the appellants that the president had modified the con-
tract by granting an extension of time in which to make the

first payment. Whether any other provision of the contract was modified, or whether all other provisions were to remain in force notwithstanding the alleged modification, it seems, no one knew. In view of the nature of the contract and its numerous provisions to merely inform Mr. Price that the time of making the first payment had been extended, it was hardly sufficient to enable him to act intelligently if he felt disposed to do so with respect to ratifying the president's alleged modification of the original contract. Price therefore acted as any prudent man would have done under the circumstances. He wanted to know what the president had done, and this it was not only his duty to ascertain, but, we think, clearly was his privilege before he was required to act. In view that the president was absent from the State of Utah when Mr. Price was told of the extension of time, it seems he did not communicate with the president, and, when the time arrived for the appellants to make the first payment, Mr. Price still insisted that he had no knowledge with regard to the alleged extension of time, and, in the presence of one of the appellants, dictated a letter to the president, who was still absent from the state, to ascertain from him the facts with regard to the alleged modification of the original option agreement. If there is the slightest evidence of an intention to ratify or of a ratification of the president's act in granting the extension of time by Mr. Price, we fail to see it. Merely informing Mr. Price that the president had modified the contract was, under the circumstances, and in view of the nature of the contract, not enough to require him to act either one way or the other. If it be the law that, if one director enters into an unauthorized contract, the corporation is bound because one or more of the other directors were informed of what the first director had done, then an easy way has been discovered by which corporate contracts and obligations may be either created or modified to the detriment, if not ruin, of both the corporation and the innocent stockholders. Such is not the law. There are circumstances under which notice to a single director, or to individual directors, or to an officer,

or particular agent of the corporation, may be notice to the corporation itself, and in this connection it may be that under peculiar circumstances the corporation would be held to have notice of the unauthorized act or contract so as to require it to take some timely action with regard to it, and in case it failed to do so it might be sufficient to estop it from afterwards repudiating the unauthorized act or contract. This rule, however, can have no application to facts and circumstances such as are disclosed by the evidence in this record. (4 Thompson on Corps., secs. 5221, 5307; 3 Cl. & Marsh. on Corps., sec. 718.) This doctrine is well illustrated and applied in *First Nat. Bank v. Drake*, 29 Kan. 311, 44 Am. Rep. 646, where will be found a very interesting and instructive discussion upon the subject by Mr. Justice Brewer.

In view of the whole evidence, no jury would have been authorized to find that there had been either a formal ratification of the president's act in granting the extension of time, nor that the respondent was estopped from ignoring the alleged extension of time by reason of anything that Mr. Price did or omitted to do. The court, therefore, did not err in granting the motion for a nonsuit. In view of this conclusion, the other matters discussed by counsel became immaterial.

The judgment is, therefore, affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

HILTON v. SLOAN et al.

No. 2055. Decided April 19, 1910 (108 Pac. 689).

1. COURTS—STARE DECISIS—OPERATION OF DOCTRINE. Where the specific ground of estoppel is alleged in an action and passed upon, the decision is not a ruling on all other grounds of estoppel, so as to be *stare decisis* as to such grounds. (Page 363.)

2. **DOWER—ESTOPPEL TO CLAIM.** Complainant was married, and afterwards, in 1873, she and her husband obtained a purported divorce from the church, which was in fact invalid. Complainant and her husband lived apart thereafter until 1900, when the latter died, and during that time complainant never asked for or received aid from her husband, and they both lived as unmarried persons, and complainant went by her maiden name until 1875, when she married another in the same city in which she and her first husband lived, and complainant was thereafter known by the name of her second husband, and in 1887—89 she joined her second husband in conveyances which were recorded, and complainant raised a large family by her second husband. After their alleged divorce, her first husband conveyed the property in controversy as an unmarried man; he then living near such property. At least six months before his death complainant was informed of a decision of the court holding church divorces invalid, but continued to live with her second husband as husband and wife. *Held*, that complainant was estopped, as against *bona fide* grantees of her husband after their alleged divorce or purchasers therefrom, from claiming dower in the land sold by him. (Page 364.)
3. **ESTOPPEL—ESTOPPEL IN PAIS—KNOWLEDGE OF FACTS—NECESSITY.** In order to be estopped, one need not in every case know the truth concerning material facts or intend to deceive the person injured if, under the circumstances, he had a reasonable means of ascertaining such facts. (Page 372.)
4. **ESTOPPEL—EQUITABLE ESTOPPEL—SILENCE.** Inaction or silence may under some circumstances amount to a misrepresentation and concealment of the true facts, so as to raise an equitable estoppel. (Page 373.)
5. **ESTOPPEL—EQUITABLE ESTOPPEL—NATURE OF DOCTRINE—“ESTOPPEL IN PAIS.”** The doctrine of “estoppel in pais” is an equitable doctrine originally applied to prevent an advantage to be taken of strict legal rights, and the equities of the particular facts must control in applying it. (Page 374.)
6. **ACTION—EQUITABLE DEFENSE—ESTOPPEL—DOWER.** In view of Const., art. 8, sec. 19, providing that there shall be but one form of action for the administration of both law and equity, an equitable estoppel may be pleaded as a defense in a legal action for dower. (Page 374.)
7. **DOWER—CONVEYANCE BY HUSBAND—BONA FIDE PURCHASERS.** Ordinary a claim of dower cannot be defeated by a claim of a *bona fide* purchaser of the land from the husband. (Page 378.)
8. **ESTOPPEL—EQUITABLE ESTOPPEL.** When one of two innocent purchasers must suffer by the acts of a third person, he who has enabled the latter to cause the loss must sustain it. (Page 379.)

9. DOWER—NATURE OF RIGHT. Dower is merely an inchoate right which may never become a vested interest. (Page 379.)
10. DOWER—DEFENSES—ESTOPPEL. The wife's right to dower is not affected by the husband's representations upon selling the land that he is unmarried unless she permits innocent persons to deal with him in good faith as an unmarried man with actual or constructive knowledge of his representations. (Page 379.)
11. ESTOPPEL—EQUITABLE ESTOPPEL—PERSONS ENTITLED—GRANTEES. One purchasing land from another who was entitled to invoke an estoppel as against claimants thereto may himself rely on the estoppel, though he had knowledge of facts when purchasing which would have prevented his grantor from invoking the estoppel had the latter known them. (Page 383.)

Appeal from District Court, Third District; *Hon. C. W. Morse*, Judge.

Separate actions by Annie F. A. Hilton against Robert W. Sloan and others; against Adolph M. Anderson and others; against Everard Bierer, Jr., and others; against Fred Stauffer and others; against Nellie M. Blair and others; against Salt Lake City; against Mae C. Beamer and others; and against Elizabeth Goeghegan and others.

Judgment for plaintiff in each case. Defendants appeal.

REVERSED WITH DIRECTIONS TO ENTER JUDGMENTS QUIETING TITLE IN DEFENDANTS.

See, also, *Hilton v. Snyder*, 37 Utah, 384, 108 Pac. 698.

Barnard J. Stewart for appellants.

N. V. Jones (Ogden Hiles, of counsel), for respondent.

FRICK, J.

The foregoing eight cases were tried together in the district court, are presented to this court in one record, and, as the decision in each one of them substantially depends upon the same state of facts and must be based upon the same legal and equitable principles, we shall, for the purposes of this opinion, treat them all as one case.

The actions were instituted by respondent to recover dower in certain real estate as the surviving widow of one Dr. John R. Park, deceased. The appellants dispute respondent's right to dower on two grounds: (1) That she is not the widow of said Dr. Park for the reason that respondent and said Park had never been married; and (2) that, even though they had at one time been married, respondent, by reason of her conduct, was estopped from successfully maintaining the actions to recover dower in the lands described in her complaints and of which appellants were in possession either as the purchasers or as the grantees from the purchasers of said Dr. Park, deceased. The pleas of estoppel are quite lengthy. It must suffice to say that the facts set forth in each of the pleas are sufficient in form and substance to entitle the appellants to prove equitable estoppels, or, as they are sometimes called, estoppels *in pais*, against respondent, if such estoppels are available in these actions as a defense. Upon a hearing of the cases, the trial court found the issue of marriage in favor of respondent; while upon the issue of estoppel the parties had stipulated the facts to be substantially as they were set forth in the several pleas, and the court found as a conclusion of law from the conceded facts that they did not constitute an estoppel, and thus both issues were resolved against appellants, and they now present the record to this court for review.

The principal errors assigned are: (1) That the court erred in its finding that the respondent and said Dr. Park were in fact married, and that they sustained the relation of husband and wife at his death; and (2) that, conceding that the respondent and said Dr. Park were in fact married, the court nevertheless erred in its conclusion of law that respondent was not estopped from successfully asserting her right to dower in the lands in question by reason of her conduct. The facts upon which this estoppel is claimed we shall refer to more fully hereinafter.

So far as the error relating to the finding of the marriage is concerned, we remark that the same grounds against such a finding are now urged that were insisted on in the cases

of *Hilton v. Roylance*, 25 Utah, 129, 69 Pac. 660, 58 L. R. A. 723, 95 Am. St. Rep. 821, and *Hilton v. Stewart*, 25 Utah, 161, 69 Pac. 671. Moreover, the evidence and all the facts and circumstances disclosed by the record before us are substantially the same as they were made to appear to this court by the records of the two cases referred to. While it is urged that there is some new evidence of an expert character relative to the difference between a so-called "sealing" and a marriage ceremony, we are of the opinion that this difference cannot affect the result as reached in *Hilton v. Roylance*, *supra*. We shall therefore not enter upon a discussion upon the question of marriage, but, for the purposes of this decision, we shall consider that question as settled by the case last referred to. The only question we shall discuss, therefore, is the question of estoppel.

Respondent asserts that this question has been settled by this court in the case of *Norton v. Tufts*, 19 Utah, 470, 57 Pac. 409, and in *Hilton v. Roylance*, *supra*. In the latter case respondent herein was appellant, and the question, she now insists, was there determined in 1 her favor, and is therefore *stare decisis* at least. If the precise question now raised by appellant was in fact presented in the two cases referred to, or in either one of them, and was there considered and decided as respondent claims, then we ought not, except for the most cogent reasons, disturb the ruling there made. In order to determine whether respondent's conclusions are correct with respect to the scope and effect of those two decisions, we have not only had recourse to the text of the decisions, but have carefully examined the pleadings, the findings of fact, and the conclusions of law, the assignments of error, and the arguments of counsel as found in their briefs in those cases, and from all the matters above referred to have been forced to the conclusion that the precise question now presented for decision was not attempted to be, nor was it, decided in either of those cases. Mrs. Wickel, the dower claimant in the case of *Norton v. Tufts*, claimed to be the surviving widow of one Elbridge Tufts under circumstances somewhat

similar to those under which respondent claims to be the surviving widow of Dr. Park. The attorneys for Mr. Norton claimed that she was equitably estopped from claiming dower in the mortgaged premises as against Norton, the mortgagee, because she had permitted Mr. Tufts and the so-called Mrs. Tufts to live and cohabit together as husband and wife for a long period of time without any protest or objection, and, further, that she, under her "church divorce," had herself married Mr. Wickel, and by so doing had recognized the validity of the church divorce, and that 2 by such conduct she had misled the public, and hence ought to be estopped from claiming any interest in Tuft's property as his surviving widow. The attorneys for Mrs. Wickel answered this contention by insisting that, while Mrs. Wickel did obtain a church divorce and in reliance upon its validity did intermarry with one John Wickel, she nevertheless, as soon as she learned that the church divorce was void and of no effect, ceased to live and cohabit with the man whom she had married, and thereafter began an action against Elbridge Tufts, her husband, for a legal divorce, which action was pending when Mr. Norton obtained his interest in the premises in which Mrs. Wickel claimed her dower right, and that, in view of these facts, Mr. Norton knew of Mrs. Wickel's claim when he obtained the mortgage, and hence she was not equitably estopped as against Mr. Norton. From what this court in speaking through District Judge Rolapp said, it would seem that the decision in *Norton v. Tufts* was in part at least based upon the ground contended for by Mrs. Wickel's attorneys. At page 477 of 19 Utah, at page 411 of 57 Pac., in discussing the grounds of estoppel, Judge Rolapp said: "In this case it appears that, prior to the time the plaintiff took this mortgage Eleanor B. Wickel had commenced divorce proceedings against her husband in the proper court in this state; and it is not claimed that she had any knowledge either of the plaintiff's purpose to loan her husband money, or of the fact that the latter executed the mortgage sought to be foreclosed; so that she was never able to advise plaintiff of her claim during any time that

such information would have been of benefit to her. We do not understand that mere silence, under such circumstances, would amount to an estoppel; because, while probably it would have been her duty to speak, and make known her claim, had she been advised that her husband was about to make the mortgage in question, yet prior to such proposed action she could not reasonably apprehend that her husband, after being made acquainted through the divorce proceedings with the fact that she claimed to be his wife, would execute a mortgage to the plaintiff, or any other person, and permit a woman having no interest in the property to assume to sign such document for the apparent purpose of releasing dower. If the plaintiff in this case was misled, it was through the wrongs of Elbridge Tufts, and not through any negligence or fault of the defendant Eleanor B. Wickel." From the foregoing it seems that the court assumed that the commencement and pendency of the action for a divorce by Mrs. Wickel "prior to the time plaintiff (Norton) took his mortgage" was in itself sufficient to apprise Mr. Norton of Mrs. Wickel's claim that she was the lawful wife of Mr. Tufts. The court thus, in effect at least, held that if Mrs. Wickel, by her former conduct, had held out to the world that Mr. Wickel, and not Mr. Tufts, was her husband, she immediately, upon learning her true status, had likewise openly by a proper action in court disavowed her relation with Mr. Wickel, and had announced that, notwithstanding her apparent former relation with Mr. Wickel, she nevertheless was the lawful wife of Mr. Tufts. The controlling elements upon which the court seemingly based the decision therefore were: (1) That Mrs. Wickel, upon learning of the invalidity of the church divorce, at once ceased to live and cohabit with Mr. Wickel, and by commencing an action for divorce against Mr. Tufts had effectually repudiated that which, by her former conduct, the public generally had a right to assume as true, namely, that she was not the wife of Mr. Tufts because she was the wife of John Wickel; and (2) that Mr. Norton at the time he obtained the mortgage, if he did not actually know of Mrs.

Wickel's claim that she was the wife of Mr. Tufts, at least had the means at hand to ascertain that fact, and that Mrs. Wickel in no way misled nor attempted to mislead him. As is clear from the opinion, therefore, the court found that Mrs. Wickel, neither in law nor in fact, had misled Mr. Norton, and hence was not estopped from asserting her claim as against him. The contention of appellants in these cases is to the effect that respondent by her acts and conduct misled them into dealing with Dr. Park as an unmarried man, and, if she is now permitted to enforce her claims against them, it can only be done by gainsaying the effect of her conduct to their detriment. This, the appellants claim, equity and good conscience forbid.

From the foregoing we think it is quite clear that the real ground of estoppel now urged was not decided to be an element in the case of *Norton v. Tufts*, and hence was not passed on in that case. While it is true that there was at least an attempt to set up an estoppel in the answer in *Hilton v. Roylance*, it is equally true that the trial court made no rulings or in any way alluded to this issue, either in the findings of fact or conclusions of law in that case. The findings of fact and conclusions of law in that case were limited to the one issue, namely the issue of marriage, and the trial court found that the respondent in these cases and Dr. Parks were not married, and that she was not Dr. Park's widow, and hence had no right of dower in his estate. If the question of estoppel was thus an issue in *Hilton v. Roylance*, the parties, as well as the trial court, had ignored and abandoned it; and, if this be so, it is not easy to see how this court could have reviewed an issue which was not considered or passed upon in some form by the trial court. It is true that the respondent, who was the appellant in that case, insisted in her brief and argument that she was not estopped, and it is equally true that Mrs. Roylance, the respondent in that case, urged in her brief and argument that Mrs. Hilton, the respondent here was estopped, but such estoppel was asserted upon the following grounds: "On the ground of public policy, public morality,

and public decency, appellant is estopped from obtaining any relief whatever in this case, or from claiming, asserting, or establishing that she is, or ever was, the wife of Dr. John R. Park." See page 48, respondent's brief in the case of *Hilton v. Roylance*. The claim of estoppel was, therefore, a mere general claim that respondent was estopped from claiming to be the wife of Dr. Park. This court in the opinion in *Hilton v. Roylance* treated the matter even more generally. All that is said upon this question is found on page 159 of 25 Utah, on page 671 of 69 Pac., where Mr. Justice Barch, speaking for the court, said: "Nor, under the circumstances disclosed in evidence, is she now estopped from asserting her marriage with Dr. John R. Park, or from denying the legality of her subsequent marriage." Not a word is there said, nor intimation made that she is estopped, for special reasons as against a particular grantee of Dr. Park, her alleged husband, but the statement of the court is confined to two matters, namely, her marriage with Dr. Park and her subsequent marriage with Mr. Hilton. The court simply held that she was not estopped from claiming the former nor denying the legality of the latter. All this may be conceded as a general proposition, and yet, when we come to apply her conduct concretely to particular individuals who had dealings with Dr. John R. Park, her husband, during his lifetime, it may be that upon the principles of common justice and in good conscience she should be estopped as against such individuals who claim as the innocent purchasers and grantees of Dr. Park. This latter is the claim that is now presented, and as a basis for which the parties to the present actions made an agreed statement of facts upon which, as we have already stated, the trial court based its conclusion that respondent was not estopped. That the former members of this court recognized a distinction between the general claim of estoppel as passed on in *Hilton v. Roylance* and the claim of estoppel as now made is clearly shown from what is said in a case decided nearly three years after the decision in the Roylance case, namely, the case of *In re Park Estate*, 29 Utah, 257, 81 Pac. 83.

In the latter case Mr. Chief Justice Bartch, who was the writer of the opinion in the Roylance case, at page 264 of 29 Utah, at page 84 of 81 Pac., in referring to the plea of estoppel, says: "Whether she can now maintain such suits against innocent third parties who made such purchase ignorant of the status existing between her and the vender, or whether her conduct during the lifetime of the vender was such as to estop her from maintaining them, are questions which we do not decide; the same not being material to this decision. Such questions can only be determined upon proper pleadings and proof. There is nothing in this case showing an estoppel." The "suits" referred to by the Chief Justice are the very suits that are now being prosecuted by respondent on the one hand and defended by appellants upon the other. From the foregoing it seems clear to us that the issue of estoppel as now presented for decision was neither presented nor decided in either of the cases to which reference has been made.

Neither can it be said that the question was necessarily involved, and hence decided, although not discussed, by the court. This contention might be sound if the parties to the actions, as well as the court, had not specifically stated what the character of the estoppel was that was claimed on the one hand and defended on the other and finally decided by the court. When a specific ground for an estoppel is alleged and the court passes upon such ground only, it cannot with any show of reason be said that such ground includes all other grounds of estoppel, and, because the court considered and passed upon that ground, therefore every possible ground which may be urged in a subsequent case has been included in the formed decision, and has thus become *stare decisis*. We do not understand this to be the law.

The question, therefore, is: Do the conceded facts constitute an estoppel *in pais* in favor of appellants, who are all grantees or purchasers from the grantees of Dr. Park, the former husband of respondent? The material facts upon the issue of estoppel, as either agreed to or not disputed, in substance, are: That on the 5th day of December, 1872, at Salt

Lake City, Utah, the respondent and Dr. Park, by a certain ceremony which this court has held constituted a valid marriage contract, became husband and wife; that on the 19th day of March, 1873, the respondent and said Dr. Park obtained what was by them supposed to be a divorce from their church, which is in words and figures as follows: "Know all persons by these presents: That we the undersigned John R. Park and Annie, his wife, before her marriage to him Annie Armitage do hereby mutually covenant, promise and agree to dissolve all the relations which have hitherto existed between us as husband and wife, and to keep ourselves separate and apart from each other, from this time forth. In witness whereof, we have hereunto set our hands at Salt Lake City, U. T., this 19th day of March, A. D. 1873. Signed in the presence of D. McKenzie. James Mack. John R. Park. Annie Flora Park." That said Dr. Park died testate on the 30th day of September, 1900, at Salt Lake City, Utah. That said Dr. Park lived continuously in Salt Lake City from December, 1872, to the time of his death, and respondent continuously lived therein from 1872 to the time of trial. That respondent and said Dr. Park never applied for nor obtained a divorce from any court of this or any other state. That they never lived nor cohabited together as husband and wife, and respondent never demanded support from said Dr. Park during his lifetime, nor received any aid from him. That said Dr. Park, in 1872, and for many years thereafter, was president of the University of Deseret, subsequently and now the University of Utah. That for many years before and up to within a short time of his death he was state superintendent of public instruction. That during the whole period of time from 1872 up to the time of his death he lived as and represented himself to be an unmarried man, and that in making the several conveyances set forth in the pleadings in the foregoing actions he represented himself to be and did convey the lands in question as a single man. That each purchaser before he obtained his conveyance caused the title to the land to be examined by a competent lawyer who approved the title as free from all in-

cumbrances and claims. That said Dr. Park lived near the real estate in question when the conveyances were made, and that respondent never was in possession or occupancy thereof, either with said Dr. Park or otherwise. That after obtaining the so-called church divorce the respondent went by her maiden name of Annie Armitage, and by that name, in 1875, married one William Hilton, an unmarried man, in Salt Lake City. That said respondent and said Hilton from thence forward continuously lived and cohabited together in Salt Lake City as husband and wife, said respondent being thenceforth known as the wife of said Hilton, and went by the name of Mrs. Hilton. That said respondent and said Hilton, while sustaining the relations aforesaid, reared a family of ten children, who were born to them from the time of their said reputed marriage up to the time of the death of said Dr. Park. That during the years 1887-89 said respondent joined in conveyances of real estate by said Hilton as his wife, all of which conveyances were recorded in the public records of Salt Lake county. That said respondent, at least six months prior to the death of said Dr. Park, was informed and knew that by the decision of this court the so-called church divorces were declared absolutely void and of no force or effect, and that the marriage relation which was attempted to be dissolved by such a divorce still continued in full force and effect. That, notwithstanding such knowledge on her part, she continued to live and cohabit with said William Hilton as his wife, and said nothing about her marriage with Dr. Park, or as to being his wife until after his death, after which she and said Hilton entered into a legal marriage, after which they continued to live and cohabit together as husband and wife the same as they had theretofore done. While the time when the original conveyances of the lands in question were made by Dr. Park is stated to have been during the years 1888 and 1889, the time when the present holders obtained their conveyances from the prior grantees of Dr. Park does not appear, except in the Geoghegan case. This we do not deem as material, for the reason that it is made to appear that all of the present claimants, as well as their grant-

ors, for many years lived in Salt Lake City, and at least some of them personally knew Dr. Park. Further, the facts clearly disclose that all knew him by reputation as a public educator and as a single man, and that, when they obtained the property in question, each purchaser had the title examined as aforesaid, and the inference is certainly strong, if not conclusive, that the original purchasers from Dr. Park and of whom the present claimants are grantees relied upon Dr. Park's conduct, habits, and mode of life as well as upon his declarations and representations that he was an unmarried man, and as such conveyed the property in question. Out of all the claimants there is but one, namely Elizabeth Goeghegan, who it appears knew when she purchased the premises that respondent claimed a dower right therein, but the original grantee of Dr. Park obtained the property now owned by Mrs. Goeghegan under the circumstances above detailed. We shall have occasion to refer to this phase of the case again. Finally, it is conceded that each one of the original grantees from Dr. Park purchased the property conveyed to him in good faith for value, and that each one of the claimants purchased in the belief that he was acquiring an absolute and unincumbered title, and that none of them, except Elizabeth Goeghegan, had knowledge, either directly or indirectly, of respondent's claim or of her relation to Dr. Park at the time of acquiring the property. The total value of the real estate of which Dr. Park became seised after 1872, and which was alienated by him before his death, is stipulated to be about \$70,000.

Appellants contend that the foregoing facts, including the inferences that may be deduced therefrom, together with the circumstances disclosed, constitute an equitable estoppel in their favor as against the dower claim of respondent. Upon the other hand, respondent, in effect, insists that whatever might be the rule as applied to other claims, as to the claims for dower, the facts are entirely insufficient to constitute equitable estoppel. Without here repeating what she claims in this regard, and without formulating a statement of the necessary elements constituting estoppel, it must suffice to

say that she relies on the usual elements which the courts under a large variety of circumstances have declared to be necessary in order to successfully invoke an equitable estoppel or estoppel *in pais*. The usual formula is perhaps as clearly stated as it can be by Mr. Pomeroy in section 805, vol. 2 (2d Ed.) of his excellent work on Equity Jurisprudence, to which we refer the reader. Mr. Pomeroy, with his usual caution and loyalty to fundamental principles, prefaces the formula adopted by him by the following suggestion: "One caution, however, is necessary, and very important. It would be unsafe and misleading to rely on these general requisites as applicable to every case without examining the instances in which they have been modified or limited." In section 808 *et seq.*, in discussing the formula aforesaid, the author more specifically refers to conduct which may give rise to an estoppel, and we think that the author clearly shows that it is not a rule of universal application that a party, in order to be estopped, must have known the real truth concerning the material facts, but that under peculiar circumstances, it may be quite sufficient to 3 create an equitable estoppel if "the party, although ignorant or mistaken as to real facts, was in such a position that he *ought* to have known them, so that knowledge will be imputed to him. In such case ignorance or mistake will not prevent an estoppel." It follows as a matter of course that, in order to make the foregoing rule applicable, the party invoking the estoppel must show that at the time he acted upon what appeared to him to be the real facts he lacked both the knowledge and the reasonable means of ascertaining the real facts, and that he relied upon the facts and circumstances as they then appeared to him in view of the conduct of the party against whom the estoppel is invoked.

Respondent contends, also, that the claim of an equitable estoppel must fail if for no other reason than that there is no evidence, either direct or inferential, that she intended to deceive any one by her conduct and that the inference is strong, if not conclusive, that she was ignorant of her own rights, was ignorant of the legal effect of the church divorce,

and that she in good faith believed that her marriage with Dr. Park was legally annulled, and that the one with Mr. Hilton was legal, and that she in good faith acted accordingly. This claim of respondent in our judgment is too broad. It is not necessary that in all cases and under all circumstances there must be shown an actual intention to deceive in order to estop a person. In 2 Herman on Estoppel, etc., section 773, in referring to the usual claim that, in order to prevent one from asserting his title upon the ground of an estoppel, an actual intention to deceive must be shown, the author says: "The doctrine (equitable estoppel) has not in equity been limited to cases where there was an actual intention to deceive. The cases are numerous where the party who was estopped by his declarations or his conduct to set up his title was ignorant of it at the time, and of course, could have had no actual intention to deceive by concealing his title; yet, if the circumstances were such that he ought to have informed himself, it has been held to be contrary to equity and good conscience to set up his title, though he was in fact ignorant of it when he 4 made the representations." It is almost unnecessary to add that mere inaction or silence may, under peculiar circumstances, amount to both misrepresentation and concealment of the true status of things which are important for others to know in order to protect their full interests. But it is further contended that the right of dower is favored by the law, and that the widow is not to be deprived of this right except where she has been guilty of some actual or intended fraud. Referring to section 755 of the volume last above quoted from, the author, in answer to the claim that, to constitute an estoppel *in pais* the party to be estopped must have been guilty of intentional fraud, says:

"All that is essential is that there should be such conduct on the part of the person against whom the estoppel is alleged as would make it a fraud for him to gainsay what he had expressly admitted by his words or tacitly confessed by his silence, but there need not be in the precedent acts actual fraud or evil design. All that is meant in the expression that an estoppel must possess an element of fraud is that the case must be one in which the circumstances and conduct would render

it a fraud for the party to deny what he had previously induced or suffered another to believe and take action upon. The door is shut against asserting a right then (when) that would result in doing an injury by the party asserting it to some other person, or when in good conscience and honest dealing he ought not to be permitted to gainsay his previous conduct."

The right to assert an estoppel by appellants against respondent, in view of the facts and circumstances of the cases at bar, rests upon purely equitable grounds. An estoppel *in pais* is entirely a creature of courts of equity, and the equities of the particular case must control the result of that case. The reasons why such estoppels were called into existence, and when and to what extent they should be enforced, are well stated by the author in section 739 of 2 Herman on Estoppel and Res Judicata, in the following language:

"This doctrine is properly and peculiarly a doctrine of equity, originally introduced there to prevent a party from taking a dishonest and unconscientious advantage of his strict legal rights, though, like many other equitable doctrines, constantly administered at 5 law. The ancient practice differed from the modern, and in actions at law, the courts, being unable of giving effect to this equity, were often enjoined where the party insisted on his rights at law contrary to the equitable doctrine. The office of equitable estoppels at law is therefore like that of injunctions in equity, to preclude rights that cannot be asserted consistently with good faith and practice, to prevent wrongs for which there might be no adequate remedy. And they should consequently, when the circumstances will permit, be so construed and moulded as not to deviate from their object; and those cases where estoppels are said to be *odious* or not favored should be only where the technicality of the estoppel cannot be subservient to its equity."

We have thus shown the general principles that govern courts in applying the doctrine of estoppels *in pais*. Some courts have mooted, while others have asserted, the proposition that an equitable estoppel cannot be invoked in an action to recover dower, unless the claim for dower is made in a proceeding in equity, for the reason that the right of dower is purely legal and is enforceable in 6 a law action. Whatever anciently may have been the practice, or whatever it may be in some of our sister jurisdictions, our Constitution admits of no doubt upon the subject,

since, by section 19 or article 8, there may be but one form of action in which both law and equity may be administered. Such, we think, is also the great weight of authority as appears from the following cases in which dower claims or similar rights were involved and litigated, and in all of which the courts recognized the right to interpose equitable estoppels as defenses. (*Prater v. Prater*, 87 Tenn. 78, 9 S. W. 361, 10 Am. St. Rep. 623; *Yorston v. Yorston*, 32 N. J. Eq. 495; *Sedlak v. Sedlak*, 14 Or. 540, 13 Pac. 452; *Richeson v. Simmons*, 47 Mo. 20; *De France v. Johnson* (C. C.) 26 Fed. 891; *Dunlap v. Thomas*, 69 Iowa, 358, 28 N. W. 637.) In a number of the foregoing cases the doctrine is also illustrated and applied that, while particular facts may not be sufficient to estop the widow as against the estate of the deceased husband, they may nevertheless be sufficient to estop her as against the innocent grantees of her husband or as against such as claim through such grantees. We remark that the foregoing cases, with possibly one or two exceptions, are not claimed by us as cases in point upon the facts and circumstances disclosed by the record before us, but what we claim for them is that they fully sustain the principles for which we contend. The case of *Richeson v. Simmons*, *supra*, is in our judgment upon principle a case directly in point. The equitable estoppel in that case was based upon a marriage relation which legally continued to exist as in the cases at bar after it was assumed by the parties to the original marriage contract to have been ended, and the estoppel was based entirely upon the conduct of the parties to the original marriage, although they were in fact ignorant of their real legal status. Notwithstanding this ignorance, however, the court enforced the doctrine of protecting the innocent by invoking, if necessary, an equitable estoppel against one who by his conduct had induced another to act although likewise innocent of any intentional deceit, fraud or wrongdoing. The language of Mr. Justice Wagner, who wrote the opinion in *Richeson v. Simmons*, *supra*, is so apropos to some of the facts and circumstances in the cases at bar that we take the liberty to quote from the opinion

somewhat at length. At page 27 of the volume aforesaid (47 Mo.), Mr. Justice Wagner, in referring to the estoppel, said:

"From all the investigation that I have given to the case it is of first impression, so far as the question presented is concerned. Now, the record shows that since 1849, a period of 20 years, Mr. Hill and Mrs. Barclay have not only lived separate and apart, but they have ceased to intermeddle with the affairs of each other. With mutual concurrence they have both changed their situation in life. Each has married and brought up children, built up separate and distinct property, and transacted their business without regard to any previous connection between them. It may be reasonably inferred that there is not any very amicable feeling of relationship existing between them. Under such circumstances does the law demand or require the absurdity of Mrs. Barclay, when she wishes to dispose of her private property, going to Mr. Hill and asking him to join in the conveyance, when at the same time he professes to be the husband of another woman? The length of time that has elapsed, the manner in which each party has regarded and treated the other ought to operate as an effectual estoppel, and preclude either party from an attempt to intermeddle in the affairs of the other. For upward of twenty years Mr. Hill, as far as his relationship toward Mrs. Barclay extends, has treated her as a *feme sole*; and upon no principle of justice has he any interest in, or can he interfere or exert any control over, her property. Mr. Hill is not here claiming any right, but it is set up in defense that the deed is not valid unless he joins and concurs. But I am of this opinion: I think that as Mr. Hill has voluntarily renounces his marital rights, and, by a course of policy persisted in for more than twenty years, has led Mrs. Barclay and the whole world to believe that all control or interest on his part had ceased and been surrendered, he can no longer be a party, nor need he be consulted in any disposition she may see proper to make of her property. Any other conclusion would be promotive of injustice and lead to the greatest hardship."

But we need not go to the extent in applying the estoppel in the cases at bar that the Supreme Court of Missouri went in *Richeson v. Simmons*. True, in that case the husband's rights to the wife's property were involved, while here it is the wife's rights. In the *Richeson* case it was held, however, that by reason of the conduct of the husband and wife, who separated and lived apart from each other, and, in the belief that they were legally divorced, each in good faith intermarried with another, and continued this relation until the action was commenced in which the question was raised,

that this constituted an abandonment of all marital rights as well as an estoppel against enforcing such rights as against any one who claimed as grantee of either husband or wife, or against the estate of either. We are not asked to, nor is it necessary for us to go to this extent in these cases. To hold that a wife by her conduct has either abandoned or forfeited all of her marital rights as against her husband and as against his estate is one thing, while to hold that by her conduct she has led those who lived in the same community with her and her alleged husband to believe that he was a single man—that all may deal with him as such—that she is the wife of another man, and that by reason of such conduct she is estopped as against those who actually dealt with the man whom she now says was her lawful husband in the belief that he was a single man, is quite a different thing. To hold that by respondent's conduct in marrying Mr. Hilton and in continuously for many years living and cohabiting with him as her husband, in joining with him as his wife in making conveyances of his real estate, in bearing his name, and rearing his and her family of ten children, she did not hold out to the world that her relations with him were precisely what they seemed to be, and that she had absolutely no claim whatever upon Dr. Park, would be to ignore the universal experience of mankind. The respondent went even farther than to permit others to deal with Dr. Park from the standpoint of mere appearances. The so-called church divorce, while impotent to dissolve the existing marriage, nevertheless, in effect, said to Dr. Park: "You may deal with your property as an unmarried man. You may represent yourself as such, and make conveyances of your property in your name as a single man." In view of this, the doctrine that a husband may not, by his representations, bind the wife with respect to her dower right in his property, does not apply. She not only in effect agreed with Dr. Park forever to abandon him, but she acted upon such agreement herself by entering into permanent conjugal relations with another, and thus, by such conduct, openly proclaimed to the world that, not only had she abandoned all personal claims upon Dr. Park, but

that all the world might deal with him upon that basis. If she had proclaimed this fact from the housetops, it would have been no more effective than was her conduct, continued, as it was, from day to day, from month to month, and from year to year until the years had covered almost an entire generation. Under such circumstances, it is idle to assert that the law favors dower, and that nothing short of a legal relinquishment or the strongest grounds for an estoppel will ordinarily deprive the wife of her dower right. We concede that the law favors the dower right, and is tenacious in protecting the wife's right in her husband's estate. We also concede that the doctrine seems established, in the United States at least, that the mere claim of *bona fide* or innocent purchasers for value is not ordinarily available as against a widow's claim of dower. (2 Scribner on Dower (2d Ed.), 168; *Gano v. Gilruth*, 4 G. Greene (Iowa), 7 453; *Felch v. Finch*, 52 Iowa, 563, 3 N. W. 570; *Cruise v. Billmire*, 69 Iowa, 397, 28 N. W. 657.)

The appellants' rights are not based upon the naked claims of innocent purchasers. While, in order to prevail, they, or their grantors, must have purchased the property from Dr. Park without notice of respondent's right, yet this without the elements of an estoppel would not be sufficient to protect them. When, however, such a purchaser obtains property under the facts and circumstances of these cases, he is protected upon broader grounds than the mere claim of innocent purchaser. In these cases, if appellants are not protected against the claims of respondent, it will result in permitting her to contradict and gainsay, to appellants' detriment, all that she by her solemn acts and daily conduct during a long period of years avowed as true, and will further permit her to now assert that she did not authorize Dr. Park to deal with all the world as a single man. This, in justice and good conscience, she ought not be permitted to do. It is still true, and as applicable as ever, that "in a moral sense that is called equity which is found '*ex aequo et bono*' in natural justice, in honesty, and in right." Moreover, if we permit respondent to assert her claims against these ap-

pellants, we must ignore the fundamental principle that, "wherever one of two innocent persons must 8 suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." (16 Cyc. 773.)

In saying what we have we are not unmindful of the fact that dower is merely an inchoate right which may or may not ripen into a vested interest, and that a wife is not required to stand guard over her husband, and 9, 10 apprise those who are about to deal with him of her rights. Neither is she bound, or even affected, by his representations that he is unmarried, unless she knowingly, or under peculiar circumstances amounting to knowledge, permits innocent persons to deal with him while in good faith believing that he is what he represents himself to be. The law will ordinarily even protect wives who are the unwilling dupes of designing men as against the claims of those who have dealt with such men when they are in fact husbands, regardless of whether persons dealing with such husbands knew the actual relation or not. But this is protecting the wife in her marital rights, and not permitting her to assert those rights against those whom, by her own acts and conduct, she has led to believe that she had no rights. Under such circumstances, a court of equity and good conscience may not arbitrarily disregard her own acts and conduct, or condone them, to the injury of others. The claim that she too was innocent and was ignorant with respect to both her real status and her rights cannot prevail as against those who, in view of all the circumstances may be characterized as more innocent. Indeed, as against that class, respondent cannot claim to be innocent. She must be assumed to have known what all others knew—that she could not legally be the wife of two men at the same time. When, therefore, she by her acts and conduct said, "I am the wife of Mr. Hilton," she, by the same acts, declared to all the world that she was not, and legally could not be, the wife of Dr. Park. Third persons therefore had a right to rely on her acts and conduct in dealing with Dr. Park. If during all

the years from 1875, when respondent married Mr. Hilton, up to about six months before the death of Dr. Park, when she says she first learned of the invalidity of church divorces, any one had asked her the direct question, "Are you the wife of Mr. Hilton, or are you the wife of Dr. Park, and in the property of which do you claim rights?" she, in view of the circumstances would, she must, have regarded the question as an insult, and without any hesitation would have announced that Mr. Hilton and no one else was her husband, and in corroboration of the announcement would have pointed to her children and her past acts and conduct. If, therefore, there was a purchaser from Dr. Park here who had taken the precaution to ask the foregoing question, and he had received the assumed answer, would any one contend, or could a court of equity be found anywhere that would hold, that as against such a purchaser respondent would not be estopped? We think not. Is there any real difference in so far as a purchaser from Dr. Park is concerned between the case of appellants and the assumed case? Again we say we can perceive none.

Counsel for respondent, however, most earnestly insist that all of the foregoing facts may be true, and yet there is nothing which will prevent respondent from enforcing her dower right. In this connection it is again asserted that the authorities are to the effect that while a widow may, by her declarations, acts, and conduct, under certain circumstances, estop herself from successfully claiming her right of dower, yet this is not the case with a wife before the death of the husband. It is therefore contended by counsel that a wife cannot be barred from claiming her dower, except by a formal relinquishment of it as provided by the statute. The case of *Martin v. Martin*, 22 Ala. 86, is cited in support of this contention, and much reliance is apparently placed upon what is said in that case. It must suffice to say with respect to that case that the proceeding there was a direct one by the widow to recover dower in her alleged husband's estate. What was said by the court, therefore, in that case with respect to an estoppel, was intended to apply to the peculiar

facts and circumstances present in that case, and not to a case where the widow is proceeding against the innocent grantees of her alleged husband. If it be conceded that as against the estate of Dr. Park respondent would not be estopped, yet as against the claims of third persons she may be, and ought to be. It may also be conceded, as is held in another case cited by counsel, namely, *Towles v. Fisher*, 77 N. C. 437, that the husband cannot represent the wife with respect to her dower right, and thus bind her by his representations, yet, under the facts and circumstances of the cases at bar, as we have already attempted to show, if respondent did not in express terms do so, she nevertheless, by unavoidable implication, authorized Dr. Park to represent himself as a single man, and to deal with his property as such. Moreover, by the same acts, and in the same manner, she announced to all the world that she not only had abandoned Dr. Park for all time, but had also abandoned all claims upon him as a wife, and she proceeded to and did act upon these declarations by entering into relations which spoke louder than mere words. What is said in the foregoing cases, therefore, can have no application to the facts and circumstances in the cases at bar. The same may be said with respect to the case of *Martien v. Norris*, 91 Mo. 465, 3 S. W. 849. The only other case upon which counsel specially rely is *Wright v. De Groff*, 14 Mich. 163. In that case the widow was held not estopped from insisting upon her dower right for two reasons: (1) Because the agreement set up against her, and upon which the estoppel was claimed, was held void under the statute of frauds and hence of no force either offensively or defensively; and (2) because the acts of the widow, the second ground of estoppel, were all performed while she was acting in a representative capacity, and the court held that they did not constitute an estoppel against her personal rights. Giving the foregoing, as well as all other similar cases, their full force and effect, what relevancy have they to the cases at bar? Clearly none whatever.

In view of all the circumstances, upon what reasonable

ground can respondent base her claim that her rights in equity and good conscience are superior to the rights of appellants? Without ignoring the fundamental principles upon which equitable estoppels are based, we confess that we are unable to see wherein respondent can now be permitted to entirely ignore her past acts and conduct as against appellants and compel them to surrender to her as Dr. Park's widow a portion of the property that they purchased from Dr. Park in good faith while she claimed to be the wife of Mr. Hilton. In order to recover in these actions, she must be permitted to say, to the detriment of appellants, that her past acts and conduct by which she led the whole community, including appellants, to believe that she was the wife of Mr. Hilton, was a mere sham and falsehood. This equity and good conscience forbids us to permit.

In what we have said we disclaim any intention to in any way reflect upon the motives or the intentions of respondent. She, to a certain extent was the dupe of circumstances, and, we have no doubt, acted in good faith. By reason of her relations with Mr. Hilton, we do not wish to be understood as imputing to her any impure motives, any moral wrong nor that she consciously (except in the manner we have stated) desired to deceive any one. If we permitted her to prevail in these actions, however, she would perpetrate a wrong upon innocent persons. Our system of jurisprudence would fall far short of accomplishing what is claimed for it if it were impotent to afford relief under circumstances like those in the cases at bar, and a court of conscience that would fail to protect the purchasers in their rights as against the claims of respondent would, in our judgment, entirely ignore the fundamental principles upon which that system of jurisprudence is founded.

In conclusion we remark that it is claimed that the judgment against Elizabeth Goeghegan should be affirmed if for no other reason than that she purchased the property claimed by her after being made cognizant of respondent's claim of dower. It is, however, conceded that Mrs. Goeghegan pur-

chased from a grantee of Dr. Park, and that this grantee obtained the property under the facts and circumstances herein stated. The grantor of Mrs. Goeghegan could thus have invoked the estoppel against respondent, 11 and, if this be so, Mrs. Goeghegan may do so as a subsequent purchaser. Ewart on Estoppel, 220-221. If this be not so, an estoppel would be of but little benefit to a purchaser of property, since he could not transfer it to another with the same rights that it is held by the purchaser. If, therefore, the original purchaser may successfully ward off an attack on his property upon the ground of an equitable estoppel against a claimant, why may not the grantee of such owner defeat the claim upon the original estoppel the same as the original owner could have done? We confess that we can see no reasons why such a grantee does not stand in the shoes of his grantor, and counsel for respondent have advanced none. What we have said with regard to the judgment against Mrs. Goeghegan applies also to the judgments against Sloan and Nellie M. Blair.

The judgment in each case is therefore reversed, with directions to the district court to set aside its conclusions of law that respondent is not estopped from claiming a dower interest in the several parcels of land described in her complaint in each case, and to substitute a conclusion of law that, by reason of the conceded and undisputed facts as they are made to appear from the stipulation of the parties and otherwise, respondent is so estopped; and to enter judgment or decree in each case quieting the title to the real estate described in the several complaints to the several appellants in accordance with the prayers contained in their answers. It is further ordered that the several parties to the foregoing actions pay his own costs on appeal.

McCARTY, J., and LEWIS, District Judge, concur.

HILTON v. SNYDER et ux.

No. 2030. Decided April 19, 1910 (108 Pac. 698).

1. **JUDGMENT—CONCLUSIVENESS—THIRD PERSONS.** Where the law provides a proceeding to establish an individual's status upon giving notice prescribed by law, a judgment in a proceeding solely for that purpose, declaring the status of the individual, is admissible in evidence against a stranger in any subsequent suit to prove such status, being evidence of that fact against all the world; but where the action is between individuals, and the status of an individual is merely incidentally in issue, the judgment therein is not admissible against strangers to that judgment, so that a judgment in an action to recover dower in land conveyed by the husband in which the widow's marriage was in issue and established is not admissible in a subsequent action against strangers to that judgment to prove the marriage; the establishment of the widow's status as a married woman being merely incidental to the main purpose of the suit. (Page 388.)
2. **JUDGMENT—CONCLUSIVENESS.** In an action against an estate to have plaintiff declared the widow of decedent under a valid marriage and to have dower awarded her, grantees of decedent were not bound by the judgment therein, establishing the marriage, the adjudication of plaintiff's status being merely incidental to the action to establish dower, so that, in an action against such grantees by the widow to establish dower in the land conveyed to them, the judgment was not admissible to prove her marriage. (Page 389.)
3. **DOWER—ACTIONS TO ESTABLISH—BURDEN OF PROOF—MARRIAGE.** In an action for dower, the burden is upon the widow to establish a valid marriage; the validity of her marriage being put in issue. (Page 390.)
4. **DOWER—FINDINGS—NEGATIVE FINDINGS.** In an action for dower, a finding that plaintiff must fail because she failed to establish the existence of a lawful marriage between herself and decedent is in effect a negative finding, and is sufficient to support a judgment for defendant on that ground. (Page 390.)

Appeal from District Court, Third District; *Hon. C. W. Morse*, Judge.

Action by Annie F. A. Hilton against Gideon Snyder and wife.

Judgment for defendants. Plaintiff appeals.

AFFIRMED.

See, also, 37 Utah, 359, 108 Pac. 689.

N. V. Jones (Ogden Hiles, of counsel), for appellant.

Snyder & Snyder for respondents.

FRICK, J.

This is an action to recover dower. The case may be said to be a companion to the case of *Hilton v. Sloan*, 37 Utah, 359, 108 Pac. 689, and the seven other cases tried with that case, all of which have just been decided by this court. The controlling issues presented for trial to the district court, affirmatively stated, are: (1) The marriage of appellant to Dr. Park; and (2) that appellant was estopped from claiming her dower interest in the land in question as against respondent. The parties to the action at the trial stipulated with regard to all the issues except that of marriage, which was left to be established by such competent evidence as appellant might produce. The only evidence that she produced in support of her claim that she was married to Dr. Park, and that she was his legal wife, and hence his widow, were the pleadings, findings of fact, conclusions of law and judgments in the cases of *Hilton v. Roylance*, 25 Utah, 129, 69 Pac. 660, 58 L. R. A. 723, 95 Am. St. Rep. 821, and *Hilton v. Stewart*, 25 Utah, 161, 69 Pac. 671.

It is deemed material to state the issues that were involved in those two cases. *Hilton v. Roylance* was an action by the appellant here to recover dower in land conveyed by Dr. Park during his lifetime, and during the time it is alleged appellant was his wife. In that case Mrs. Roylance denied that appellant and Dr. Park ever had been married. The trial court found that issue in favor of Mrs. Roylance and entered judgment accordingly, but this court, on appeal, reversed the judgment, and ordered findings and judgment in favor of appellant here, who was also appellant in that

case. By the findings and judgment in that case it was adjudicated that appellant and Dr. Park were married as claimed by appellant, and that at the time of the conveyance of the property involved in that case, and at the time of his death, she was his legal wife. In the action or proceeding of *Hilton v. Stewart, supra*, appellant petitioned the court (1) that it be adjudged that she is the widow of Dr. Park; (2) that she be awarded a certain sum per month out of Dr. Park's estate as his widow for maintenance and support pending the administration of the estate; and (3) that she be awarded a widow's share in the estate of Dr. Park. It may be said that in effect the latter proceeding was either directly against the estate, or indirectly so by proceeding against Mr. Stewart as the executor of the last will and testament of Dr. Park, which will had, in a proper proceeding, been duly probated when *Hilton v. Stewart*, was commenced and determined. The district court in *Hilton v. Stewart* also found against appellant upon all three claims aforesaid. On appeal to this court, however, the findings and judgment of the district court were reversed as to the first and third claims. As to the second claim the lower court was sustained by this court, but for reasons other than those given by the district court.

From the foregoing it will thus be seen that in two actions of proceedings in which appellant was plaintiff it had been adjudicated by this court that she at a certain time and place was legally married to Dr. Park, and that at the time of his death was his lawful widow, and as such was entitled to a widow's share in his estate. At the trial of the case at bar in the district court that court *pro forma* admitted the findings and judgments aforesaid in evidence over respondent's objection, with the understanding, however, that their effect as evidence would be determined later. Upon further consideration, the court ruled that the findings and judgment in neither of the cases mentioned were admissible as evidence of the marriage in the case at bar. Appellant having produced no other or further evidence of her marriage with Dr. Park, the court found that issue in

favor of respondent, and entered judgment against appellant upon the sole ground that she had failed to prove her marriage to Dr. Park, and hence had not established her right to dower in the lands in question. Appellant assigns the ruling of the court excluding the judgments as error, and insists that the findings and judgment in both cases were competent and conclusive evidence of the marriage claimed by her.

As we understand appellant's contention, it is in effect, this: That proceedings to establish a status, such as marriage, divorce, pedigree, citizenship, inquisitions of lunacy, etc., are in their nature proceedings *in rem*, and hence the judgment by which the status of any individual is adjudged is competent evidence as against all the world to prove the status as it is declared to be by such a judgment. (2 Black on Judgments, secs. 802-806, inclusive.) Appellant therefore insists that in both cases referred to her status, namely, that she was the legal wife of Dr. Park, was solemnly adjudicated, and that hence the judgments in those cases were at least evidence of her marriage with Dr. Park. It may be conceded that, where there is some law by which a proceeding to establish a status of any individual may be instituted upon such notice as may be prescribed by law, that in such a proceeding the judgment declaring the status of the individual in whose interest or against whom the proceeding is had may ordinarily be used as evidence against all the world for the purpose of proving that the status is what it is declared to be in the judgment. Generally it may be conceded that in nearly all, if not all, jurisdictions special proceedings are provided for by which the status of certain individuals may be determined and established when for special reasons it becomes necessary to do so. Those most generally provided for are inquisitions of lunacy, naturalization proceedings by which certain individuals are adjudged citizens, and matters of that character. We know of no special law or procedure in this state, however, whereby every possible status may be established as is done in some countries, notably in England. (*Shores v. Hooper*, 153

Mass. 231, 26 N. E. 846, 11 L. R. A. 308.) But, even where status may be determined by some special proceeding, notice thereof is usually provided for which must be given to some designated public official, or to the public generally, by publication, or the like. In this way the public generally may be said to have been brought into court, and for that reason may be bound by the judgment, for certain purposes at least. In cases between individuals, however, where the status is merely incidentally in issue, a judgment, which, among other things, also fixes the status of one or both parties, is not admissible as evidence of that fact as against strangers to that judgment. So far as we are aware, the reasons for the rule itself governing the admission and exclusion of judgments obtained between private parties in proceedings where the status of an individual is incidentally involved are the same as in other cases. As we understand the rule which distinguishes a status from any other element in a case, it is this: If an action, although prosecuted by one individual against another, is instituted for the sole purpose of changing or declaring the status of either one or both of the parties to the action, then, in the absence of fraud or collusion in obtaining the judgment, it is binding upon all the world as well as the parties and their privies. But, if the status is merely incidentally involved the judgment, although fixing the status of either or both parties, is not admissible as against strangers as evidence of the status. It certainly cannot be seriously contended that the case of *Hilton v. Roylance* was instituted and prosecuted for the purpose of establishing appellant's status. The purpose of that action was to recover dower, and the relation of appellant to Dr. Park, while a material issue, was nevertheless only an incidental issue. That is, the principal thing sought to be obtained by that action was to obtain dower in particular land once owned by Dr. Park, and by him conveyed to Mrs. Roylance, and, in order to obtain the principal thing, the marriage between appellant and Dr. Park had to be proved. This was, therefore, a mere element to be established. Dr. Park's ownership of the prop-

erty during the marriage relation, his conveyance thereof, and its value were elements which had to be established, all of them essential, but only incidental. It might as well be contended that the judgment in the Roylance case was evidence upon any other issue in any other case commenced by appellant to recover dower in so far as 2 the issues in the two cases were the same. It is manifest the court committed no error in excluding the judgment in the *Hilton v. Roylance* case.

Did the court err in excluding the judgment in the case of *Hilton v. Stewart*, which we have assumed in effect was a proceeding against Dr. Park's estate? We think not. Assuming, but not deciding, that all those who claimed any interest in Dr. Park's estate were in legal effect parties to the proceeding instituted by appellant to obtain a dower interest therein, it does not follow that all those who simply claim as grantees of Dr. Park, and who claim no interest in his estate as such, were also parties to the proceeding. While any person who claimed a direct interest in Dr. Park's estate could no doubt have resisted appellant's claim for dower, and if she was successful might have prosecuted an appeal from any judgment so obtained, such clearly was not the case with respondents. They had no interest in Dr. Park's estate as such, and claimed none, and hence could not have tested appellant's right to dower in it. They had to postpone their defense, if any they had, to her claim for dowers, until she sought to enforce it against property in which they were interested. Respondents, therefore, were in no sense parties to or interested in the action or proceeding of *Hilton v. Stewart*, and hence cannot be affected by any judgment that was rendered therein, or be concluded by any fact or facts that may have been judicially determined and established in that proceeding. The end in view in instituting those proceedings was not merely to establish the status of appellant, but it was to have her rights in Dr. Park's estate as his widow determined and adjudicated. Her status, in so far as strangers to the estate were concerned, was thus again determined and declared for the purpose of a par-

ticular proceeding only. Under such circumstances, the judgment entered in a proceeding in which the status is in fact declared is not evidence of the fact in another proceeding, unless such judgment would be admissible as evidence upon grounds upon which judgments are generally admissible. That such is the law is well and clearly stated in *Shores v. Hooper*, 153 Mass., at page 235, 26 N. E., at page 848 (11 L. R. A. 308), where, in speaking for the court, Mr. Justice Devans said:

"The only relation which the former proceeding in the probate court had to the present suit is that the demandant, in order to succeed there was obliged, as against other parties, to prove, as she is here, that she is the daughter of Dr. Ellis. If that had been, as this is, a writ of entry against another party for a piece of land, it certainly cannot be maintained that a recovery of a judgment there by a decision in her favor would enable her, so far as this proof is concerned, to recover a judgment against the tenant for a different piece of land, even if the title to both pieces had descended to her from the same ancestor. In the proceeding in the probate court, as a preliminary fact to be decided before the administrator could be held liable, it was found that the defendant was the daughter of Dr. Ellis. Even if the subsequent determination of the responsibility of the administrator and settlement of his accounts would be conclusive under our statutes, proper notice having been given, and to that extent would possess many of the characteristics of a judgment *in rem*, the finding which preceded should have no effect in other proceedings against another party, a stranger, not affected by any notice thereof, nor entitled to be then heard therein, if he had actually appeared."

The only difference between that case and the case at bar is that, in order to entitle the claimant in that case to recover, she had to judicially establish the fact that she was a child of the deceased, while in this case appellant is required to establish the fact that she is the wife 3 of Dr. Park, deceased. In that case the relation of the claimant to the deceased person had been judicially determined in another proceeding just as it has been in this case. In the proceedings reported in the case referred to it was necessary to again establish the relation as a necessary element in the case precisely as in the case at bar. The claimant in that case attempted to establish the relation by using the judgment in the former proceeding as evidence wherein her

relationship was determined and adjudged, and the court held that the judgment was inadmissible as evidence to establish that fact as against a stranger to the judgment. This is the precise question involved in the ruling complained of, and if the decision in *Shores v. Hooper, supra*, is sound, and we think it is, then the ruling complained of in this case is right. The following are among the best-considered cases in which the question of when and to what extent judgments are evidence of the facts adjudicated therein, in other proceedings, is discussed and decided: *Shores v. Hooper*, 153 Mass. 228, 26 N. E. 846, 11 L. R. A. 308; *Brigham v. Fayerweather*, 140 Mass. 411, 5 N. E. 265; *Sorensen v. Sorensen*, 68 Neb. 483, 98 N. W. 837; *State v. McDonald*, 108 Wis. 8, 84 N. W. 171, 81 Am. St. Rep. 878; *Farrell v. St. Paul*, 62 Minn. 271, 64 N. W. 809, 29 L. R. A. 778, 54 Am. St. Rep. 641. We have carefully examined the authorities cited upon the foregoing propositions by counsel for appellant, and while in some of them general expressions are used which, if standing alone, might lead one to the conclusion that there are authorities to the effect that, when a status is once determined and adjudicated in any case, the judgment in that case may be used as evidence of the status in other cases, yet, when the cases upon the subject are carefully read, the conviction is forced upon one that little, if any, room for doubt is left that the law upon the question is as we have attempted to outline it herein.

From what has been said it follows that the court committed no error in excluding the judgments. It also follows that, if this ruling is correct, then the court had no alternative save to find the issue of marriage against appellant, for the reason that the burden of establishing the marriage was upon her, and, as she adduced no evidence in support of the issue, the court was bound 4 to find in the negative. We remark that the finding of the court is to the effect that appellant must fail for the reason that she failed to establish the existence of a lawful marriage between her and Dr. Park. Since there is no objection to the form of the finding, and as it is in

effect a finding in the negative, and is sufficient to support the judgment, we also have no alternative save to affirm the judgment, with costs to respondent. It is so ordered.

McCARTY, J., and LEWIS, District Judge, concur.

SARGENT v. UNION FUEL COMPANY.

No. 2114. Decided April 26, 1910 (108 Pac. 928).

1. **DISMISSAL AND NONSUIT—GROUNDS—ESTOPPEL.** Decedent died leaving a widow, and she sued as widow and sole heir for wrongful death. Thereafter she, having been appointed administratrix of decedent's estate, moved to amend by adding herself as administratrix as party plaintiff. This was allowed, and defendant again answered the amended complaint, and, after the jury was impaneled, plaintiff, without objection, was permitted to again amend by striking her individual name as a party plaintiff from the record. *Held*, that defendant, having permitted such amendments without objection, was estopped to demand a dismissal of the action on the ground that one party had been substituted for another. (Page 395.)
2. **PARTIES—SUBSTITUTION.** In an action for wrongful death, the substitution of decedent's personal representative for decedent's widow as plaintiff was not a violation of the rule forbidding a substitution of parties which operates to change the original causes of action.¹ (Page 395.)
3. **APPEAL AND ERROR—REVIEW—QUESTIONS NOT MADE AT TRIAL.** Where, in an action for death, the amended complaint alleged that the widow was the sole heir, but no objection was made at the trial that the evidence showed that decedent left surviving his widow and his father, it could not be first claimed on appeal that the court should have granted a motion to dismiss because of such variance. (Page 396.)
4. **PLEADING—AMENDMENT—NEW ISSUES.** Where, in an action for death of a servant in a mine, the complaint alleged that defendant permitted the roof to be dangerous, and negligently failed to timber it or in any manner support the roof or provide against its dangerous condition, by reason of which a large mass of rock fell and killed deceased, the court did not err in permitting a trial amend-

¹Pugmire v. Diamond Coal & Coke Co., 26 Utah 115, 72 Pac. 385.

ment by inserting the words "and because the pillars of the mine had been and were being withdrawn therefrom," objected to on the theory that such language interposed a new issue, defendant not having claimed surprise, or that it was unprepared, and not having asked for a continuance or postponement. (Page 397.)

5. **MASTER AND SERVANT—DEATH OF A SERVANT—MINES—ACTION—EVIDENCE.** In an action for the death of a miner who was struck by rock falling from the roof of a tunnel, evidence that rock and earth had fallen from the roof at different times prior to the accident and at other places was admissible to show the character of the ground and the necessity of timbering or otherwise supporting the roof, and notice to defendant of the defective and dangerous conditions. (Page 397.)
6. **APPEAL AND ERROR—EVIDENCE—HYPOTHETICAL QUESTIONS—REVIEW.** Where error was assigned on the admission of evidence in answer to hypothetical questions over an objection that the questions assumed facts not in evidence and that facts in evidence were not embraced in the action, but counsel, after the question had been reformed to meet his objections, did not point out either at the trial or on appeal what facts were erroneously included or omitted, the assignment would not be reviewed. (Page 398.)
7. **APPEAL AND ERROR—OBJECTION NOT MADE AT TRIAL—RULINGS ON EVIDENCE.** An objection to evidence not made at the trial will not be considered on appeal. (Page 399.)
8. **APPEAL AND ERROR—RULINGS ON EVIDENCE—MOTION TO STRIKE—NECESSITY.** Where the cross-examination disclosed that an expert's opinion was based partially on what plaintiff's counsel had told him out of court, as well as the facts assumed in a hypothetical question, but no motion was made to strike the testimony at the trial, its admissibility could not be reviewed on appeal. (Page 399.)
9. **TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.** Where there is no evidence on which to predicate a request to charge, it may be properly refused. (Page 400.)
10. **APPEAL AND ERROR—QUESTIONS AVAILABLE—EXCESSIVE VERDICT.** That the verdict was excessive and was given under the influence of passion and prejudice cannot be reviewed on appeal. (Page 400.)

Appeal from District Court, Third District; *Hon. T. D. Lewis*, Judge.

Action by Rose C. Sargent, as administratrix of the estate of George Lorenzo Sargent, deceased, against the Union Fuel Company.

Judgment for plaintiff. Defendant appeals.

AFFIRMED.

Mathoniah Thomas and W. J. Barrette for appellant.

Evans & Evans and David Evans for respondent.

STRAUP, C. J.

This is an action to recover damages for wrongful death. From a judgment entered upon a verdict rendered in favor of the plaintiff the defendant appeals. The deceased was a married man and left no issue. By section 2912, Comp. Laws 1907, it is provided that, "when the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs, or his personal representatives for the benefit of his heirs, may maintain an action for damages against the person causing the death." The action was commenced in the name of Rose C. Sargent, the deceased's widow. It was alleged in the complaint that the deceased left no issue, and that she was his widow and sole heir. A demurrer was interposed to the complaint on the ground, among others, that the plaintiff had not the legal capacity to sue. The demurrer was overruled. The defendant answered, pleading to the merits. Thereafter the plaintiff proposed an amended complaint wherein Rose C. Sargent, administratrix of the estate of the deceased, was added as a party plaintiff. In the amended complaint it was alleged that she was the duly appointed, qualified, and acting administratrix of the estate, and that she was the widow of the deceased and his sole heir. The amended complaint was allowed and filed with the consent of the defendant. The defendant again answered, pleading a general denial, contributory negligence, and assumption of risk. After the jury was impaneled the plaintiff again proposed an amendment to the amended complaint by striking out the individual name of Rose C. Sargent as a party plaintiff. In response to an inquiry from the court, the defendant's counsel stated that there was no objection to the amendment, and thereupon it was allowed.

The complaint, as amended, then stood in the name of the administratrix in her representative capacity, and contained the allegations that she was the widow of the deceased and the sole heir and beneficiary of the estate. The defendant then moved to dismiss the action "on the ground that an entirely different plaintiff has been substituted for the one that originally brought the suit." The court denied the motion. Complaint is made of this ruling.

No complaint is made of the proceedings by which the administratrix was made a party to the action, nor the individual name of the widow stricken as a party; nor could the defendant well complain, of them because of its consent to the rulings in that regard. If the defendant had cause for complaint, it ought to have made it when 1
leave was asked to make the administratrix a party to the action. The defendant, having consented to the amendments making the administratrix in her representative capacity a party, and striking the individual name of the widow as a party, cannot thereafter be heard to assert that one party has been substituted for another, and seek to dismiss the action on such ground. To allow that is to permit it to take inconsistent positions. If there was a substitution of parties, the defendant consented to it when it consented to the amendments. Furthermore, in the case of *Pugmire v. Diamond Coal & Coke Co.*, 26 Utah, 115, 72 Pac. 385, it was held by this court that, in an action for wrongful death, the personal representative could be substituted in place of the widow and children, and that such 2
substitution was not in violation of the general rule forbidding a substitution of parties which operates to change the original cause of action. While it was alleged in the original and amended complaint that the widow was the sole heir, it was, however, shown by the evidence that the deceased left surviving him his widow and his father. But no complaint was made of that to the court below, and no action of the court invoked in respect of it. Counsel, however, in argument here attempt to make much of it in support of their contention that the court erred in denying the motion

to dismiss the action. Such observations have no pertinency to the question in hand. A defendant might as well before trial move the court to dismiss the action upon 3
alleged grounds that the allegations of the complaint are untrue. We think no error was committed in the ruling complained of.

The defendant was engaged in operating a coal mine and in mining and removing coal therefrom. The deceased was in its employ, engaged in hauling cars loaded with coal along an underground tunnel from the place where the coal was dug to the place where it was hoisted to the surface. It was alleged in the complaint that the ground above the tunnel was loose, broken, and insecure, and that timbers were required to protect the roof of the tunnel and to prevent earth and rock from caving and falling therefrom, and that the defendant suffered and permitted the roof to be insecure and dangerous and "negligently and carelessly failed to timber or in any manner support said roof, or in any manner provide against the dangerous condition thereof," by reason of which a large mass of earth and rock fell from the roof and struck the deceased and killed him. On the day of the trial, and before the jury was impaneled, the plaintiff asked leave to amend the complaint by inserting the words "and because the pillars of said mine had been and were being withdrawn therefrom." With such amendment the complaint then read to the effect that the rock and earth which struck the deceased fell by reason of the negligence of the defendant in failing "to timber or in any manner support said roof, or in any manner provide against the dangerous condition thereof" (as stated in the complaint before the proposed amendment), "and because the pillars of said mine had been and were being withdrawn therefrom," as added by and stated in the amendment. The defendant objected to the amendment on the ground that it introduced a "new and different charge of negligence." The court, in overruling the objection and allowing the amendment, observed that "that evidence could be introduced without the amendment." Complaint is made of this ruling. It is urged by the ap-

pellant that "it should not have been forced to the trial of an issue withheld from its knowledge and then sprung at the moment of trial." We think the ruling was right. No new issue was presented by the amend- 4
ment. Furthermore, the defendant did not then claim that it was taken by surprise, or that it was unprepared, nor did it ask for a continuance or postponement. It cannot be heard to make such claim now.

Over defendant's objections, plaintiff was permitted to show that rock and earth had fallen from the roof of the tunnel at different times prior to the accident, and at places other than the place of the accident. We see no error in these rulings. Such evidence was admissible as 5
tending to show the character of the ground, the necessity of timbering or otherwise supporting the roof, and notice to the defendant of the defective and dangerous conditions.

Lengthy hypothetical questions were propounded by plaintiff to expert witnesses examined in her behalf and their opinions asked with respect to the usual method of timbering under the conditions assumed, and they were asked "What in your judgment as an experienced miner should have been done in order to render" the roof "reasonably safe so that rock" sloughing or breaking off "would not be falling," and to prevent rock and earth from falling? Over the objections of defendant, the witnesses were permitted to answer, to the effect that the usual method was "by putting square sets of timbers in and lagging over the top." The objections made at the trial were that the hypothetical questions proposed were indefinite, included some things not in evidence, excluded others in evidence, and that the witnesses had not qualified. No objection was made, nor is it contended, that the questions called for opinions or conclusions of an issued to be tried, and upon which the decision of the case depended, nor is it here claimed that the witnesses had not properly qualified, except that they had not been in the mine, and had no personal knowledge of the conditions assumed in the questions. We therefore pass that. When the objection was interposed to the question propounded to

the first witness, the court inquired of counsel for the defendant "what facts are assumed in the hypothetical question of which there is no evidence?" Counsel replied: "Perhaps I would better put it that it bears on the indefiniteness" with respect to the frequency of the falling of the rock, and that "no condition is involved as to the kind or character of the rock, conditions with relation to coal, the relation of the soil, its dryness or dampness, seams or no seams, hardness or softness of the rock." The question was then reframed, embracing such conditions. The defendant still objected on the same grounds. The objection was overruled, and the court took the answer of the witness. Upon an objection made to the question propounded to the second witness, the court again inquired of counsel what facts were assumed in the question which were not in evidence. Counsel replied: "I do not think that we are called upon to suggest what it should be or in what respect it fails." The court indicating a different view, counsel suggested that there was not any evidence "as to the consistency and the character of the soil and the rock in that place, and as to its condition with relation to cracks and crumbling." Again, the question was reframed embracing such conditions. The defendant still objected on the same grounds, which objection was overruled and the answer of the witness received. These rulings are also complained of.

The appellant still asserts that "the questions did not include all, or even substantially all, of the facts brought out in the evidence." No attempt is made to inform us what facts were assumed in the question which were not in evidence, or what facts in evidence were not embraced in the question. If after the questions were reframed 6 counsel were unable to point out any to the trial court and are unable to do so now, we think they no longer have cause for complaint in that regard.

Further complaint is made with respect to the testimony of one of these witnesses upon the alleged ground that his answer was based "not upon the alleged facts in the hypothetical question, but a statement of alleged conditions made

to him out of court." No such complaint was made to the court below. It is here made for the first time. The witness on cross-examination was asked if the attorneys for the plaintiff had not talked with and described to him the conditions of the tunnel and entryway, and asked his opinion. He replied that they had and that he told them his opinion. He was then asked if he did not come into court with that opinion, and if his answer which he made in response to the hypothetical question propounded to him was not partly based on what was told him out of court, and partly upon the question propounded to him, and he replied that it was. Counsel, however, made no motion to strike the testimony of the witness, nor did they otherwise ask any ruling of the court or raise any question in respect of the testimony in such particular, nor was the court in any manner given an opportunity to rule thereon. If counsel at 7, 8 the trial were content to let the testimony of the witness remain notwithstanding such showing on the cross-examination, they must be content now.

It is also urged that the defendant's motion of nonsuit ought to have been granted on the ground that the evidence was insufficient to show negligence on the part of the defendant, and that it conclusively appeared that the deceased assumed the risk. All counsel have to say in support of the first is that the substance of the evidence on behalf of the plaintiff, except the testimony of the experts, "was a narrative of the occurrence of the accident and a description of the physical conditions in the mine. There was no hint in any of that testimony that these conditions were other than the usual conditions in coal mines, or that the accident was other than one of the unfortunate occurrences in what is recognized by all as an extremely hazardous employment," and that the plaintiff tried but failed "to supply the deficiency by testimony of the experts." In support of the second, all that is said is "it appeared from plaintiff's own evidence that the hazards of the business were open and apparent, and that, if the deceased had the intelligence claimed for him, he could not help realizing them, and therefore assumed the risk of

them." Counsel have not referred us to any evidence where these things are made to appear, nor have they attempted to do so; nor have they attempted to point out in what particular the evidence lacked in essential facts to show negligence on the part of the defendant, except to urge us that the conditions of the defendant's mine as shown by plaintiff's evidence were no worse than those found in other mines. Notwithstanding the failure of counsel in such particulars, and of the additional burden cast upon us in consequence of it, we have nevertheless examined the record, and find that all the essential averments of the complaint with respect to the defendant's negligence are sufficiently supported by the evidence to carry the case to the jury, and that the question of assumption of risk was also one of fact. No error was therefore committed in submitting the case to the jury.

Error is also assigned upon the ruling of the court in refusing to give certain requests of the defendant. They are to the effect that if the deceased was not at the place where the rock and earth fell upon him in the discharge of duties assigned to him, and if he voluntarily assumed to labor at such place when he was required and instructed by the defendant to labor elsewhere, the plaintiff could not recover. We find no evidence upon which to predicate such a charge. The requests were therefore properly refused. 9

It is also contended that the verdict is excessive, and was given under the influence of passion and prejudice. We have so frequently held such a question not reviewable here that it is useless to longer urge it. 10

We are of the opinion that the judgment of the court below ought to be, and it accordingly is, affirmed, with costs.

FRICK and McCARTY, JJ., concur.

TERRY v. PETERSON et al.

N. 2118. Decided April 26, 1910 (108 Pac. 1106).

1. GAMING—ACTIONS FOR RECOVERY OF MONEY—DIRECTION OF VERDICT. Evidence in an action by a wife to recover the proceeds of the sale of the homestead, lost by the husband in gambling, *held* insufficient to require the court to direct a verdict in favor of plaintiff. (Page 405.)
2. GAMING—ACTIONS TO RECOVER MONEY—INSTRUCTIONS. In an action by a wife to recover money lost by her husband in gambling, the money being the proceeds of the sale of their homestead, the court charged that if the jury found that the money was gambled by the husband with the knowledge and consent of plaintiff, and not against her will, then she was not entitled to recover, since, where money is loaned or advanced with the understanding between the parties that it should be gambled, the lender becomes *particeps criminis*, and cannot recover for the money, and that, where a party advancing money to be used in gambling participates and shares in the gambling transaction thus promoted by his act, he becomes a *particeps criminis*, and he cannot recover the money. *Held*, that the charge was not objectionable as suggesting that plaintiff could not recover because she was *particeps criminis* and an accomplice to the criminal transaction, nor did it differ in principle from a requested instruction of plaintiff that to entitle her to recover the jury must find, among other things, that plaintiff's husband gambled the money without her consent, and contrary to her wishes. (Page 407.)

Apptal from District Court, Second District; *Hon. J. A. Howell*, Judge.

Action by Emma Maud Terry against Frank Peterson and Charles Creighbaum doing business as the St. Louis Gambling Hall, under the name of Peterson & Company.

Judgment for defendants. Plaintiff appeals.

AFFIRMED.

J. D. Skeen for appellant.

E. T. Hulaniski and *A. R. Heywood* for respondents.

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STRAUP, C. J.

Plaintiff's husband owned in Weber County, Utah, a parcel of ground upon which they and their children lived. He sold it, and gambled away a portion of the proceeds of the sale. The plaintiff brought this action in her own name to recover the money from the defendants, alleged to have been gambled and lost by her husband at the defendants' gambling house in Ogden City. The case was tried to the court and a jury. A verdict was rendered in favor of the defendants. The plaintiff appeals.

The assignments relate to alleged errors in the charge of the court and the court's refusal to direct a verdict in favor of the plaintiff. We have no statute in this state permitting a recovery of money lost at gambling or wagering. The theory upon which plaintiff's case is predicated, and as stated in her complaint, is that the real estate, the title of which was in her husband's name, constituted their homestead; that when it was sold and conveyed her husband, in consideration of plaintiff's signing the deed of conveyance, agreed with her "that the proceeds of said sale were to be used and retained for the purpose of purchasing another homestead," and that in pursuance of such agreement they entered into a contract with another to purchase another home; that the husband, "contrary to plaintiff's instructions and against her will, without any consideration whatever placed \$1641.20 of said money in the custody of said defendants in the St. Louis Gambling Hall," their alleged place of business, "and that they have since held and they now hold said money for the use and benefit of plaintiff and her said family," consisting of two minor children.

It was shown by the evidence that at the time of the transaction referred to the plaintiff knew that her husband was, and prior thereto had been, addicted to gambling, and that he was an habitue of gambling resorts. She testified that when they concluded to "sell their home and buy another," she made him promise her before she signed the deed of conveyance "that he wasn't to gamble any of the money—that, if he hadn't done, I would never in the world have signed

the deed"—and that she exacted the promise because she was apprehensive that he might gamble the money. She further testified that the real estate sold was originally purchased by them with her husband's money, and that the title thereof was in his name; that they and their children resided upon it, and that it was sold for the sum of \$1960, to be paid in cash, and the purchaser assume a mortgage indebtedness upon it; that \$100 of the proceeds were paid to her husband at the time of the sale; that he applied \$50 on the purchase price of a new home, and gambled the other \$50; that in March, 1908, \$450 more of the proceeds were paid to her husband, who applied \$200 thereof on the purchase price of the new home, and gambled away \$250; that on the 27th day of March of the same year the balance of the proceeds of sale, amounting to \$1410, was paid to her husband, who with her knowledge deposited it in his own name in the bank where he had a bank account and did a banking business. She further testified that, before the last payment was made, she knew that her husband had gambled the amounts testified to by her, and that "he promised me faithfully he would not gamble any more, and I supposed he wouldn't gamble any more. It went on and went on, and Mrs. Robinson (the vendor of the new home) wasn't ready for us to pay the rest on the farm, so Mr. Terry he goes and gambles the money in the bank. I talked to him and pleaded with him, but it was no use. He had lost \$600 or \$700 of the last money before I knew he had been gambling the last time. I came to town, and had people go and get him out of the gambling halls." She further testified that she made no complaint, however, to any one except to her husband. The plaintiff also put in evidence her husband's bank account which showed his deposits, and the amount of checks drawn against it, from November 14, 1907, to August 1, 1908. The account showed that on the 26th day of February, 1908, when the real estate in question was sold, he had no credit balance, and that the amount of his deposits between the 26th day of February and the 1st day of August, 1908, was \$2310. Her husband testified in her behalf that such

deposits consisted of \$1810 derived from the proceeds of the sale, and \$500 won at gambling. The account showing the amount of checks drawn out at different times does not show in whose favor they were drawn. He, however, testified with respect to the checks drawn by him between the 26th day of February, 1908, and the 1st day of August, 1908, and that he gambled most of them "at the St. Louis Gambling Hall," the defendants' gambling place, amounting in the aggregate to \$1818. He further testified that sometimes he lost and sometimes he won; that one occasion he won \$875 or \$900, and took the money home in his pocket and told his wife about it, but that some days later he returned to the St. Louis Gambling Hall and there lost it; that during the period in question he lost at that place all that he won there. He also testified that he gambled at five or six other gambling places in Ogden City, but always won at such places, and then went to the defendants' gambling place and lost such winnings. Counsel for plaintiff called his attention to particular checks, one by one, as shown by the bank account, from February 26, 1908, to August 1, 1908, and asked him, "What did you do with that?" He answered: "That was gambled. Where? At the St. Louis Gambling Hall." Nowhere is it made to appear by his testimony or by other evidence in the case that he directly or indirectly gave or paid or lost any of the money to the defendants or either of them, or to any one for them, or that they or either of them directly or indirectly received any from him. Each time when he was asked what he did with the money checked out of the bank by him on particular checks to which his attention was called he merely answered that he gambled it at the St. Louis Gambling Hall. He did not testify, nor was it otherwise made to appear as to the manner in which the business was conducted, what games he played, or with or against whom he gambled or played, or whether the defendants or the house won or received any of his money. All that is made to appear in that regard is that he checked money out of the bank on particular checks and gambled it at the St. Louis Gambling Hall, the defendants' place of business. There

being no evidence to show that the defendants or either of them received any of the money gambled by plaintiff's husband, we need not consider the question of the alleged trust relation between the plaintiff and her husband arising out of the facts that the real estate sold was their homestead, in which the plaintiff, as a wife, had an interest, and likewise had an interest in the proceeds derived from the sale of it, and therefore could follow them into whosoever hands they may have come without a lawful or valuable consideration.

Furthermore, the court was justified in refusing to direct a verdict in favor of the plaintiff in the sum of \$1641.20, as requested by the plaintiff, because the evidence rendered it uncertain as to the amount of the alleged trust fund gambled at defendants' gambling hall. True, plaintiff's husband testified that he gambled at that place \$1818, which was checked from his bank deposits. The amount of the deposits, consisting of \$2310, checked against, was made up of \$1810 derived from the proceeds of sale and \$500 won at gambling. The two were commingled and checked against indiscriminately. Between the dates stated, February 26 and August 1, 1908, the whole of the bank deposits was checked out by him, \$1818 of which he gambled at the defendants' place of business, and \$500 of which he spent elsewhere and for other purposes. Of the \$1818 checked out and gambled by him at the defendants' place of business it cannot be ascertained how much of that amount was of the deposits made up from the proceeds of the sale, and how much of the deposits made up from the moneys won at gambling. If the entire amount of \$500 won at gambling and deposited in the bank was included in the \$1818 checked out by him and gambled at the defendants' place, then he gambled at that place but \$1318 of the alleged trust fund, or the difference between \$1818 and \$500. It is just as inferable that a portion of the alleged trust fund—to the extent of \$500—was spent elsewhere than at the defendants' place, as that the whole of such fund was spent at their place.

For both reasons no error was therefore committed in refusing to direct a verdict as requested.

What we have said in respect of the insufficiency of the evidence to show that the defendants received any of the moneys gambled at their place by plaintiff's husband might well also dispose of the complaint made of the charge. Still, for other reasons, the plaintiff has no cause to complain of that. The court, at plaintiff's request, and in accordance with her theory, charged the jury that if they found that plaintiff's husband owned the real estate which was sold, and upon which she and her husband with their children resided as a homestead, and that, when it was sold, she signed the deed because of the agreement with her husband that the proceeds of sale should be applied to the purchase of another home, and that except for such agreement she would not have signed the deed, and if in pursuance of such agreement the husband held the proceeds of sale in trust for such purpose, and that he gambled and lost \$1641.20, or any portion of the proceeds, in the gambling house of the defendants, without the plaintiff's consent and contrary to her wishes, then the plaintiff had the right to claim such money as exempt against the defendants, and was entitled to recover. The court, however, further charged the jury, to the effect, that if they found that such agreement was not had, or if they found that the money was gambled by the husband with the knowledge and consent of the plaintiff and not against her will, then she was not entitled to recover, "for the court charges you that, where money is loaned or advanced with the understanding between the parties that it should be used in gambling, such party becomes *particeps criminis*, and cannot recover in a suit for the money, and that where a party advancing money to be used in gambling participates and shares in the gambling transaction thus promoted by his act becomes *particeps criminis*, and he cannot recover in a suit for the money." The criticism made of the last instruction is that there was no evidence to "justify the court in throwing out the suggestion to the jury that she (the plaintiff) could not recover because she was *particeps criminis*,

an accomplice to the criminal transaction." We 2
think no such suggestion was made by the court. The
charge of the court, as was requested by the plaintiff, that,
to entitle her to recover, the jury must find, among other
things, that plaintiff's husband gambled the money without
her consent and contrary to her wishes, and the charge that,
if they found that the money was gambled with her knowl-
edge and consent or was advanced to him by her for such
purpose, then she could not recover, were but statements in
different form of the same principle. The court did not
say, nor suggest to the jury, as is contended, that the plain-
tiff was a *particeps criminis*. What the court said was that
where one lends or advances money to another with the under-
standing that it is to be used in gambling, and where such
party participates and shares in the gambling transaction
promoted by his act, he is *particeps criminis*, and cannot re-
cover. The criticism which is made of the charge is there-
fore unfounded. The court charged the jury upon the theory
of the case as stated by the plaintiff in her complaint, and
as requested by her. No other portion of the charge is in
conflict therewith, nor was there a wrong or inapplicable
principle of law announced in other portions. The plaintiff
therefore has no just cause to complain of the charge.

The judgment of the court below must therefore be affirm-
ed, with costs. Such is the order.

FRICK and McCARTY, JJ., concur.

ERICKSON v. CHILDS.

No. 2073. Decided April 27, 1910 (108 Pac. 1108).

APPEAL AND ERROR—REVIEW—EVIDENCE TO SUSTAIN FINDINGS.—Where
findings for either party would have been supported by some sub-
stantial evidence, the Supreme Court cannot interfere with the
judgment below on the sole ground that the findings are not sup-
ported by any substantial evidence. (Page 409.)

Appeal from District Court, Seventh District; *Hon. J. F. Chidester*, Judge.

Action by L. H. Erickson against Moroni Childs.

Judgment for plaintiff. Defendant appeals.

AFFIRMED.

Lewis Larson for appellant.

Christenson & Woolley for respondent.

FRICK, J.

Respondent brought this action to recover damages for trespass alleged to have been committed by appellant's cattle by eating and destroying respondent's lucern, which had been cut for seed, and while in the stack on respondent's land. Appellant's defense consisted of a general denial. Respondent had alleged his ownership of the lucern and the value thereof; that appellant's cattle had trespassed on respondent's land and had caused the alleged damages. At the trial respondent adduced some evidence, direct and inferential, in support of every material allegation of his complaint, and the appellant also adduced evidence which, if believed, would constitute a complete defense to respondent's cause of action. The evidence was submitted to the court without a jury. Upon consideration of all the evidence, the court found the issues in favor of respondent, and entered judgment accordingly. Appellant caused the evidence adduced at the trial to be preserved in a bill of exceptions, and now presents the same, together with the judgment, to this court for review on appeal.

The only error assigned and argued by counsel for appellant is that the evidence is insufficient to sustain the findings of the court in certain particulars, which are duly specified. In this contention we cannot agree with counsel. While counsel was not required to raise the question of law, he now raises by a motion for a nonsuit; and, while he has

forfeited no legal rights by not presenting it in that form, yet, if he had raised it when respondent rested his case, the court, in view of the evidence, would not have been justified in granting the motion, and, if we view the case in the light of the evidence in support of respondent's 1 contention alone, then respondent's case, by reason of some admissions made by appellant at the trial, was as strong, if not stronger, when appellant rested as it was when respondent rested. It would subserve no good purpose, nor be of any material benefit either to the parties to this action, or to any one else, for us to set forth the evidence pro and con, or to assign special reasons why we think there is ample evidence, direct and inferential, to support the court's findings and judgment. It may be conceded that if the trial court had believed all that appellant and his witnesses testified to that the findings should have been in his favor, but it must also be conceded that it was the province of the trial court to determine and say upon what side, in view of all the circumstances, the weight of the evidence preponderated.

After a careful reading of all the evidence contained in the bill of exceptions, the conclusion is forced upon us that the record presents a case where findings for either party would have been supported by some substantial evidence, and, in view of this, we cannot interfere upon the sole ground that the findings are not supported by any substantial evidence, and that hence the judgment is erroneous.

The judgment, therefore, should be, and it accordingly is, affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

PATTERSON v. RYAN.

No. 2099. Decided April 27, 1910 (108 Pac. 1118).

1. **WATERS AND WATER COURSES—APPROPRIATION—EXTENT OF RIGHTS.** Plaintiff's intestate in 1901 took possession of land surrounding springs on arid and unsurveyed public land, erected a cabin, constructed a corral, and fenced in a few acres. Until his death in 1905, he maintained the corral and fences, and a portion of time each year lived in the cabin and while living there used the water for culinary purposes and to water a team and saddle horse, but never used it for irrigation. Prior to 1901 sheep and cattle men used the water, and thereafter intestate occasionally required the sheep men to pay for the water while the cattle men used it without, but neither disputed nor interfered with intestate's right to use the water. Defendant, a cattle man, watered his cattle at the springs for a number of years. *Held*, that intestate, although he might have been a trespasser on the land, acquired the right to use the quantity which he used, and, although he posted no notice that he intended to appropriate the water in accordance with the law in force in 1901, the notice and record thereof being merely *prima facie* evidence that the person giving the notice was applying the water to some beneficial use, so that plaintiff had the right to use the quantity of water used by intestate, and even if he had no right in the land surrounding the springs, he could divert it to some other place, if possible. (Page 414.)
2. **WATERS AND WATER COURSES—APPROPRIATION—NATURE AND EXTENT OF RIGHTS.** Trespassers upon land may acquire the exclusive right to the use of water either to irrigate land or for other purposes, and, when such right is acquired, it is paramount to the rights of the true owner or claimant of land, and the water claimant, when he is dispossessed of the land, may divert and use the water elsewhere, if he can so do it.¹ (Page 415.)

Appeal from District Court, Fifth District; *Hon. Joshua Greenwood*, Judge.

Action by Edward Patterson, as administrator of John Patterson, deceased, against John Ryan.

Judgment for defendant. Plaintiff appeals.

REVERSED AND REMANDED.

¹Sullivan v. Mining Co., 11 Utah, 438, 40 Pac. 709, 30 L. R. A. 186.

William F. Knox for appellant.

E. W. Senior and *Allen T. Sanford* for respondent.

FRICK, J.

This action was brought by appellant, as administrator of the estate of one John Patterson, deceased, to quiet title to the use of the water flowing from certain springs known as the Potsum Pah springs, situate in Pine Grove Valley, Beaver County, Utah.

The facts which we deem material, as developed at the trial, in substance, are: That the land on which the springs in question are situated is arid, and up to the time that this action was commenced continued to be unsurveyed public domain. In the year 1896 one Thomas McCune filed a desert entry on the lands surrounding the said springs, constructed one or two small reservoirs to hold the waters flowing therefrom, and thereafter placed troughs at the springs, conducted the water into them, and used the same to water live stock; that said desert entry was contested, and in August, 1903, was duly canceled by the local United States Land Office, and the action of the local office was approved by the Commissioner of the General Land Office at Washington, D. C., on the 19th day of January, 1905, and said McCune by said decision forfeited all rights under his desert entry aforesaid. In March, 1901, and while the desert entry of said McCune was still, *prima facie* at least, in force, but when said land and springs were seemingly abandoned and the water flowing from said springs was not being used by any one except as hereinafter stated, the deceased, John Patterson, took possession of the lands surrounding the springs and of the springs, erected a log cabin 16x14 feet near said springs and constructed a corral, and fenced in a few acres of the land near the springs, and, in connection with the improvements aforesaid, he also cleaned out the reservoirs constructed by said McCune. Said Patterson died on the 4th day of January, 1905. From March, 1901, to the time of his death, he maintained the corral and fences aforesaid, and a portion of the time during each year stayed

in the cabin aforesaid, and at such times he used the water from the springs for his culinary needs and to water "a team and saddle horse," which the testimony shows he kept with him when staying in said cabin. While Patterson fenced in some land which the testimony shows could have been irrigated, it is clear that he never planted any crops or used any water for irrigation, except what by force of gravity ran over a portion of the inclosed lands where some "salt grass" was growing. The testimony also shows that for many years prior to 1901 both the sheep men and cattle men used the water of the springs to water their flocks and herds when they were ranging in the vicinity of the springs in the winter season; that in 1901, and for several seasons and at various times the deceased, Patterson, would require the sheep men to pay him something for watering their sheep at the springs. The number of times that such charges were made is not clear, but it did not occur very often. Some of the sheep men, however, used the water to water their sheep at times during the years aforesaid without paying the deceased, or without asking him for the privilege to do so, and the cattle men, it appears, used the water from the springs without paying the deceased anything, but neither the sheep men nor the cattle men after March, 1901, disputed or interfered with the deceased's right to use the water for the purposes he used it as aforesaid. The defendant was one of the principal cattle men who watered cattle at the springs for many years in the manner aforesaid, but he apparently had no special rights in the water of the springs up to the time this action was commenced, except to use it for his cattle, as above stated. There is much evidence in the record relating to entries of the lands surrounding the springs in question and the proceedings in the United States Land Office relative thereto, all of which we deem immaterial. The evidence is conclusive that the deceased at the time of his death had no right in or to the lands surrounding the springs or any lands in their vicinity, but both the legal and the equitable title to all of said lands was in the United States at the time aforesaid and when this action was commenced. After the death of

said Patterson, to-wit, on the 26th day of December, 1905, the defendant filed his application to appropriate the water of said springs with the state engineer of the State of Utah in accordance with chapter 108, Laws Utah 1905, but the state engineer, just before the time this action was commenced, rejected said application, and the defendant did not within the time, nor as provided by said chapter, bring an action in any court to review the action of said state engineer in rejecting said application, but he did set forth the facts with respect to said application and the rejection thereof in this action in the nature of a counterclaim.

Upon substantially the foregoing facts, the court found in favor of the defendant, and found that the said John Patterson, deceased, had acquired no rights to the use of the water of said springs or any part thereof, and adjudged the right to the use of the water thereof to be in the defendant. The administrator appeals from the court's findings and judgment.

Counsel for appellant urge that, in view of the undisputed facts, the court erred in its findings and judgment in so far as it adjudged that the plaintiff, as the administrator of the estate of said John Patterson, deceased, was not entitled to the use of the water of said springs, and also in its findings and judgment that said defendant was entitled to the use of said water. It seems to us that the court laid too much stress upon the question of the right of possession or ownership of the lands surrounding the springs. Even if it be assumed that some one of the different parties who at some time claimed some rights in said land at one time had some equitable right or title thereto, yet the evidence is conclusive that no one ever used, or attempted to use, the water on said land for irrigation or for the purpose of producing crops of any kind thereon, not even grass for pasture. In view of this fact, any one claiming the legal right to use said water had to base that right upon a use and for a purpose other than irrigation. While the evidence shows that both the sheep men and the cattle men, among whom was the defendant, used the water of said springs for many years

prior to the spring of the year 1901 when the deceased took possession thereof, yet this use was not an appropriation of the waters of said springs, and was not so intended, since it merely consisted in driving their flocks and herds to the springs for water the same as they might have done to any other stream or water which was suitable to water live stock. Moreover, the use of the water as aforesaid was merely sporadic and intermittent, and the quantity of the water used was so uncertain that under the evidence it would be impossible to determine the quantity of the water the defendant would be entitled to if it were found that, by reason of the foregoing facts, he at the time of said Patterson's death was legally entitled to claim any rights to the use of said water. It seems to us that the right of the deceased to the use of at least a portion of said water as against the defendant is based upon more substantial ground. As we have seen, when the deceased took possession of the springs, no one was using the water except that both sheep and cattle men during certain portions of the year in the manner before stated drove their sheep and cattle to the springs. Again, it is made to appear that whatever rights Mr. McCune had in the use of said water, if any, he in effect surrendered (not transferred) to the deceased in 1902, and, after that time, it seems McCune made no further use of the water, or claim thereto, and his desert entry was canceled in 1903 by the United States Land Office, and he never appealed from that decision. Was it necessary for the deceased, Patterson, to have some right or title in and to the lands surrounding the spring, or any land upon which he applied the water for the purpose of irrigation, or, if he did not so apply the water, was he required to post notices under the law in force in 1901 that he intended to and did appropriate the water flowing from said spring for a specific purpose before he could acquire the legal and exclusive right to the use of all or any portion of said water? The right to the use of water in this state has always depended upon whether the person claim- 1
ing the water applied it to a beneficial use, and the notice and record required by the statute was merely *prima*

facie evidence of the facts recited therein, namely, that he was applying the water to some beneficial use. Any person, however, who actually used the water for a useful or beneficial purpose, acquired the right to take the water so used as against all subsequent claimants, regardless of whether the user had posted notices or not. Again, in so far as using the water for irrigation is concerned, the exclusive right to use certain waters in this state has always been independent of and separate from the ownership of the land on which the water was used or the ownership of any land. To this effect is the case of *Sullivan v. Mining Co.*, 11 Utah, 438, 40 Pac. 709, 30 L. R. A. 186. The authori- 2
ties generally support this view. (Weil Water Rights, etc. [2 Ed.] section 63.) But the authorities are to the effect that even trespassers upon land may acquire the exclusive right to the use of water that is used either to irrigate such land or is used thereon for other purposes, and that such a right, when once acquired, is paramount to the rights of the true owner or claimant of the land, and the water claimant, when he is dispossessed of the land, may divert and use the water elsewhere than on the land if he can so divert and use it. (*Smith v. Logan*, 18 Nev. 149, 1 Pac. 678; *Alta Land, etc., Co. v. Hancock*, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217; *Santa Paula Waterworks v. Peralta*, 113 Cal. 38, 45 Pac. 168.)

In the California cases some distinction is made on account of riparian rights, which distinction, however, does not militate against or affect the principle just stated. The deceased, therefore, although he may have been a trespasser on the land, still had a right to appropriate and use the water from the springs in his cabin for culinary purposes, and for the purpose of watering his team and saddle horse. That he used a certain amount of water from said springs during a portion of each year from March, 1901, until the time of his death, January 4, 1905, no one disputes, and no one seems to have questioned his right to do so. Is there any doubt that the use the deceased made of the water was a beneficial use within the meaning of that term? We think

not. If, therefore, the deceased commenced the use of the water from the springs at a time when he had a right to appropriate the water, or any part thereof, and if he applied it to a beneficial or useful purpose, why was he not at the time of his death entitled to so much of the water of said springs as he had appropriated and used for such purpose? Counsel for respondent, as we understand them, do not assert the contrary, except to claim in a general way that the deceased never acquired any right to use the water or any part thereof. In view of the evidence, we are unable to see upon what this claim rests. If, as the court seemingly concluded, the defendant could acquire some right to the use of the water of the springs by merely intermittently and at long intervals driving his cattle to drink the water, why could not the deceased acquire a right to at least a portion of said water by making a daily use of it for a beneficial purpose for a portion of each year for a term of years? In our judgment the defendant's use of the water was too intermittent and uncertain either as to time or quantity to prevent the deceased from acquiring a right thereto, and, for the same reason, we think the claim to the water by appellant by reason of the fact that the deceased on different occasions required the sheep men to pay him for the use of the water in watering their flocks is too uncertain a use to authorize a court to find and adjudicate that the appellant has any right to the water by reason of what the deceased did or claimed in that regard. The number of times that the deceased exacted pay from the sheep men was comparatively small at best, and did not occur in every year, or always while the deceased was on the land near the springs. Nor did he ever exact pay from cattle men, nor from all the sheep men, although it appears from the evidence that quite a number of them watered their cattle and sheep at the springs during a part of the time when the deceased stayed in his cabin near the springs. It also appears from the evidence that neither the deceased nor his team and saddle horse were present at the springs or used the water as aforesaid, except during a portion only of each year commencing with March,

1901, and ending January 4, 1905, when the deceased died. Just what the exact time was does not appear, and is not found by the court, except the finding that the deceased used the water as aforesaid "a few months each year." Nor did the court find how much water in quantity, or what proportion of the springs the deceased used as aforesaid.

In view of all the facts and circumstances, we are of the opinion, therefore, that the appellant as administrator is entitled to a specific finding with respect to the quantity or proportion of the water from the springs that the deceased used for culinary purposes and to water his team and saddle horse, and the length of time that the water was used for those purposes each year from 1901 to 1905, and, when said quantity and time of use is ascertained, the appellant is entitled to a decree awarding him for the benefit of said estate the quantity of water so found for the time aforesaid. If it be found that the appellant has no right to use the water for the purposes aforesaid, or for any beneficial purpose, on the land surrounding the said springs, then he may, nevertheless, use the water in the quantity that it is found the deceased used it, and for the time that he used it, by diverting it to some other place if appellant can do so. (*Smith v. Logan, supra*; *Santa Paula Waterworks v. Peralta, supra*.) If appellant, however, has no right to use the water at or near the springs as the deceased used it, and if he will not divert and use it elsewhere or dispose of it to some one who will use the same, then appellant at some time in the future may be deemed to have abandoned the right to the use of the water the same as any one else would be deemed to have abandoned rights by nonuser.

From what has been said it follows that the district court erred in its application of the law to the facts of this case. In view of the unsatisfactory state of the evidence upon the two questions, namely, the amount of water that the deceased, Patterson, used for culinary purposes and for his team and saddle horse, and the season or the length of time he so used it during each year, we are unable either to direct

findings or to make any upon those questions. Since there must be findings upon these two questions before the case can be finally determined, nothing remains for us to do except to reverse the judgment, and to remand the cause for a new trial, with directions to the district court to proceed with the case in accordance with the views contained in this opinion. It is so ordered, appellant to recover costs.

STRAUP, C. J., and McCARTY, J., concur.

STATE ex rel. NEWELL v. DISTRICT COURT IN
AND FOR THIRD DISTRICT et al.

No. 2133. Decided April 27, 1910 (108 Pac. 1121).

1. **RECEIVERS—INSOLVENCY—RECEIVERS—RIGHTS OF ACTION.** A receiver of an insolvent corporation is authorized to intervene in an attachment suit against the corporation and file a motion to set aside an order of sale of the attached property. (Page 421.)
2. **EXECUTION—INTERVENTION BY THIRD PERSON—REMEDY BY MOTION.** The general rule that none but parties to original actions can move the court to recall or quash an execution is subject to an exception in favor of persons not parties who will necessarily be prejudiced by the enforcement of the writ, such as subsequent purchasers, lienholders, and execution or judgment creditors. (Page 422.)
3. **RECEIVERS—CLAIMS AGAINST PROPERTY—LEAVE OF COURT TO SUE** The court appointing a receiver may, on proper application, grant leave to a person interested in the property in the receiver's hands to segregate it from the general mass and to sell the portion so segregated, and apply the proceeds to the payment of a lien existing in favor of the appellant. (Page 423.)
4. **EXECUTION—ORDER OF SALE—RECALL OF EXECUTION.** Where the court makes a formal order for the sale of attached property, under Comp. Laws 1907, sec. 1414, providing for sale of property under a special landlord's lien, and section 3080 providing for a sale of attached property after the recovery of judgment, a subsequent order of the court recalling a special execution issued in pursuance of the order is a nullity and does not affect the order of sale, since such order of sale is in the nature of a judgment which cannot be set aside except by formal proceedings recognized by law for that purpose. (Page 425.)

5. **CERTIORARI—REVIEW OF VOID ORDER—RECALL OF EXECUTION.** Where the court in attachment proceedings makes a formal order of sale, in pursuance of which a special execution is issued, a subsequent order of the court recalling the execution, though void as beyond the power of the court, *certiorari* will lie to annul such subsequent order since the petitioner cannot be required to expose himself and the officer to proceedings for contempt for disregarding the court's order. (Page 427.)

Certiorari by the State, on the relation of Henry Newell, against the District Court for the Third Judicial District, Salt Lake County, and others to review an order of such court setting aside an order of sale in attachment proceedings.

ORDER ANNULLED.

Decided April 27, 1910.

M. E. Wilson for plaintiff.

Lawrence & Robertson, Stephens, Smith & Porter, Dean F. Brayton and *Allen T. Sanford* for defendants.

FRICK, J.

This proceeding was instituted in this court under its original jurisdiction to obtain a writ of *certiorari*, which was prayed for to enable this court to review a certain order made by the district court of Salt Lake County, by which said court quashed or set aside a previous order entered by said court. The latter order directed the sale of certain personal property held under a writ of attachment issued in favor of the petitioner, and which property was held for the purpose of satisfying a judgment obtained by him in said court.

The facts briefly stated are: That on July 17, 1909, in a certain action then pending in the district court of Salt Lake County, wherein one Copeland was plaintiff and the Salt Lake Public Service Company, a corporation, and others were defendants, one W. B. Albertson was duly appointed receiver of, and took possession and retained possession of, the property and assets of said corporation for the purpose of winding up its affairs; that said corporation, as the tenant of the petitioner, became indebted to him in the sum of \$1403.15 for rent; that, under our statute, sections 1407 to 1415, inclusive, Comp. Laws 1907, a lessor has a lien upon the property of the lessee for rent due and unpaid, which lien, under ordinary circumstances, is enforced by the commencement of an action, followed by an attachment by which the property of the lessee is seized and held pending the action and the entry of judgment therein; that on the 12th day of January, 1910, in an action duly commenced and pending in Salt Lake County, and in which an attachment had been duly issued, and certain property attached under the statute referred to, the petitioner, as lessor, obtained a judgment against the receiver of said corporation for the amount above stated; that before the bringing of said action the petitioner applied for and obtained leave from the district court aforesaid to bring the same against the receiver of said corporation, and obtained leave of said court to attach and take possession of certain property belonging to said corporation and in the possession of said receiver by virtue of said writ of attachment which was duly issued in said action; that after said property was surrendered by the receiver and seized under said writ of attachment, and after the judgment as aforesaid was obtained, said court ordered the attached property sold and the proceeds thereof to be applied to the satisfaction of said judgment to the extent of said proceeds; that after said order of sale had issued the defendants in this proceeding filed a motion in said district court to recall and quash said order of sale, or execution, as they call it, which motion was substantially based on the following grounds: That the movants appeared in the original

action in which the receiver was appointed, and by way of cross-complaints there set forth that the defendant Savings & Trust Company, a corporation, had a valid and subsisting lien on all of the property, real and personal, of said Salt Lake Public Service Company by virtue of a trust deed or mortgage, and that the other two defendants had valid and subsisting statutory liens against said property, all of which the petitioner concedes to be true; that all of the property of said company at the time petitioner's action was commenced was in the possession of the receiver of said public service company, and that the same was by him held for the benefit of all the creditors of said company which was insolvent; that said defendants were not parties to nor appeared in the action of said petitioner, and that "it is an abuse of the process of this court to cause execution" to be levied upon the "property which is in the hands of the receiver;" and, further, "that it is unlawful and improper for said sheriff to interfere with the possession of said property." The district court granted the request of the defendants and entered an order recalling or quashing said order of sale or so-called execution. Counsel for petitioner in effect contend that the court was without jurisdiction to make said order (1) because there was no proper proceeding commenced or pending in which said court was authorized to act; (2) because the court was powerless to grant said motion for the reason that the movants had neither the right nor legal authority to make the motion or to obtain the relief sought by them in the manner and by the proceeding before stated; and (3) because the court in any event was without authority to recall said order of sale, and hence the order quashing the so-called execution is void.

It is fundamental that "every court has power to watch over the execution of its judgments," and thus has the power to recall or quash an execution or order of sale that has been improvidently or irregularly issued. (*Rhodes v. Smith*, 66 Ala. 179; *Mattocks v. Judson*, 9 Vt. 343.) All courts have power to "revoke, correct, restrain, or quash their own process, in the course of their ordi-

nary jurisdiction." (*Robinson v. Yon*, 8 Fla. 355; *Eaton v. Cleveland, St. L. & K. C. Ry. Co.* [C. C.], 41 Fed. 422.) The contention, therefore, that the court was without jurisdiction generally cannot be sustained.

Nor is the contention sound that the defendants had no legal right or authority to invoke the aid of the court by motion; nor that the court had no authority to pass upon the question upon a mere motion. While, no doubt, it is the general rule that none but parties to the original or principal action who are liable to be injured can 2 complain, and thus move the court to recall or quash an execution, yet there is an exception to this rule which is as well recognized as is the rule itself. Mr. Freeman, in his excellent work on Executions, in referring to the general rule, says: "To this rule an exception probably exists in favor of persons who, though not parties to the action, must necessarily be prejudiced by the enforcement of the writ, such as subsequent purchasers, lienholders, and execution or judgment creditors." (1 Freeman on Executions [3d Ed.], sec. 75.) That filing and serving a motion on the adverse party is the proper method of making the application, if made to the court in which the judgment is rendered, or out of which the execution is issued, whether the application be by a party to the action or by one affected as aforesaid, is also well settled, as appears from section 73 *et seq.*, of the volume just cited. The doctrine, as stated by Mr. Freeman, is supported by the following authorities: *Canan v. Carryell*, 1 N. J. Law, 3; *Fox v. Union Turnpike Co.*, 37 Misc. Rep. 308, 75 N. Y. Supp. 464; *Harrington v. O'Reilly*, 9 Smedes & M. (Miss.) 216, 48 Am. Dec. 704; *Jaffray v. Saussman*, 52 Hun, 561, 5 N. Y. Supp. 629.

The only case found which is directly to the contrary is *Wallop v. Scarborough*, 5 Grat. (Va.) 1. There are, however some other cases which are sometimes referred to as being in harmony with the Virginia case. Some of those cases, like those from Georgia, are, however, based upon special local statutes, and hence have no special bearing upon the question, while in others, of which *Hanika's Estate*, 138 Pa. St.

330, 22 Atl. 90, 21 Am. St. Rep. 907, is a type, the holding is really based on the question that the party who applied to set aside the execution was not prejudiced, and hence his application was denied. Under the great weight of authority we think it must be conceded that the defendants had sufficient interest in the property to entitle them to invoke the aid of the court in the premises, and that their application by motion was proper.

The real difficulty in this case, however, arises when we come to consider its real status. It is true, as counsel for the defendants contend, that the well-established rule is that property in the hands of a receiver is in the custody of the court appointing him, and cannot, without special leave of said court, legally be meddled with by any person, with or without process. It is, however, equally true that the court may, upon proper application, grant leave to a person who is interested in the property which is in the receiver's hands to segregate it from the general mass and to sell 3 it, or a part of it, and to apply the proceeds thereof to the payment of an existing lien, or to take it and dispose of it as the court may direct. That this is the law is well established by the authorities. In *Dugger v. Collins*, the Supreme Court of Alabama, in discussing this question in 69 Ala., at page 330, approves and adopts the language of Mr. High, as the same is found in section 141 of that author's work on Receivers, as follows:

"So extremely jealous are courts of equity of any interference *pendente lite* with the possession of their receivers, that they will not ordinarily permit property which is the subject of a receivership to be sold on execution. . . . The proper remedy for a judgment creditor who desires to question the receiver's right to the property is to apply to the court appointing him to have the property released from the receiver's custody in order that he may proceed against it under his judgment."

In 2 Story, Eq. Jur., sec. 833a, the same thought is expressed. To the same effect is *Stanton v. Heard*, 100 Ala. 515, 14 South. 359. The rule is also tersely stated in 34 Cyc. 235, and is fully discussed in the same volume at page

411 *et seq.* The undisputed facts show that the petitioner strictly complied with the law and the orders of the court having jurisdiction over both the receiver and the property. Leave of court was obtained not only for the purpose of bringing an action against the receiver, but leave was also asked for and granted to the petitioner to seize particularly described property from the possession of the receiver, and segregate it from the general mass of property in his hands under his appointment. All this was done under the writ of attachment authorized by the court in the action against the receiver and was permitted for the express purpose of satisfying the petitioner's statutory landlord's lien. The property seized under the writ of attachment issued as aforesaid was thus placed into the custody of the officer who acted for and represented the petitioner, and was held by said officer during the pendency of the petitioner's action and until his claim should be merged into a judgment, which, as we have seen, was entered on the 12th day of January, 1910. Counsel for defendants concede that the property was seized by and with the consent of the court, but they contend that it was not surrendered by the court except for the special purpose of permitting the petitioner to perfect or establish his landlord's lien. We are unable to assent to this view. In view that the receiver had been appointed and had possessed himself of the property, and had thus, in legal effect, placed it into the custody of the court, the court, no doubt, could have made the statutory lien of the petitioner effective without the formality of a special attachment proceeding. In an ordinary case the purpose of such proceeding no doubt is to bring the property into the custody of the law by seizing it under a writ of attachment, but, since the property in question was already within such custody, we can see no good reason for permitting the seizure in this instance except to have the receiver surrender the property for the benefit of the petitioner in view of his landlord's lien. The orders of the court in that regard still stand unaffected, and as long as they remain in full force and effect we cannot see how the court had any power or authority to interfere

with the petitioner in carrying into effect the prior subsisting and undisturbed orders of the court.

Nor is the suggestion that the court, in quashing the so-called execution, recalled what it had authorized before of controlling force. The order of the court, authorizing the petitioner to seize the property in question, was in the nature of an adjudication that the facts and circumstances, set forth by him in his application for leave to sue 4 the receiver and to seize said property, rendered it proper for the court to order said property turned over to the petitioner for the purpose of satisfying his lien. The exact time when the court made the foregoing adjudication as evidenced by the order to seize the property the record does not disclose, but it does show that it must have been made some time before the 30th day of July, 1909, as on that date the attachment was issued which was based on the order of the court by which the property was surrendered and taken for the benefit of the petitioner. The matter then remained in abeyance until January 12, 1910, when the judgment in favor of petitioner was entered. In that judgment the property released by the court and taken by the officer for the petitioner is particularly described, and in the judgment it is provided that it is "further ordered, adjudged, and decreed that the property above described be sold to satisfy the amount of said lien," namely, the petitioner's landlord's lien. In the motion of the defendants, neither the original order by which the property was by the court ordered released, nor the judgment in which said order is, by implication at least, approved and the property ordered to be sold, is assailed. All that is attacked and asked to be quashed is a subsequent order of sale which defendants call an execution. While it may be conceded that, if this were merely an ordinary case of attachment followed by a judgment, the court might have possessed the power to suspend the sale of the attached property at any time before sale on the motion of any one having a lien on or interested in the property, yet this is not such a case. In this case the property, in contemplation of law, was not taken by virtue of an

attachment, but it was taken, and could only have been legally taken, by virtue of the court's order authorizing it. That order, as we have seen, is not questioned by any one, but remains in full force and effect. Nor is the judgment in which the property was ordered sold to satisfy petitioner's lien attacked or questioned by any one. If it be conceded, therefore, that when defendants' motion was made to set aside the so-called execution, the motion was made in time to authorize the court to modify its judgment, yet the motion was not made for that purpose; nor did the court modify it or attempt to do so in the order it made and which is attacked in this proceeding. This being so, the pretended order of the court to quash the so-called execution was, in legal effect, merely an indirect attempt to modify a prior order and judgment of the court in an unauthorized manner.

It seems to us that whether the order of sale, or so-called execution, be considered in the light of section 3080, Comp. Laws 1907, which provides for the sale of attached property "if judgment be recovered" in an action, or in the light afforded by section 1414, which applies to sales under the special landlord's lien statute, the result must still be the same. In neither section is an order of sale or execution contemplated. Nor, in the absence of an express statute, can we see any good reason for any such order of sale or execution. The usual purpose of such orders or executions is to authorize the officer to seize the property of the execution debtor and to sell it as contemplated by the execution. In attachment proceedings the officer seizes and obtains possession of the property by virtue of the writ of attachment, and the statute, in express terms, authorizes the sale if a judgment is obtained. In such proceedings, therefore, the officer, in selling the attached property after judgment, acts by virtue of the statute, and not by virtue of special process. True, it may be convenient in practice, and may also be convenient for the officers and clerks, to issue a formal order of sale, but what legal efficacy such an order has, or what authority it confers upon the officer in selling attached property that he does not possess without it, in view of our stat-

ute, exceeds our comprehension. In this case the officer in taking the property acted under the direct order of the court by which the property was surrendered to him for the benefit of the petitioner, and in selling it the officer would have acted both by virtue of the statute and by the order contained in the judgment and decree to which we have referred. In granting the motion, therefore, to set aside the so-called execution, the court effected nothing. The court, however, did more than merely to set aside the execution. It ordered the sheriff not to sell the property. In making this order we are of the opinion that the court exceeded its power and authority, and hence the order in that regard is void and of no effect. Although it was beyond the power of the court to make the order, yet the petitioner was not required to expose himself and the officer to proceedings for contempt by disregarding the court's order, but he could do what he has done—institute these proceedings to annul the court's unauthorized act. 5

In view of all the circumstances, we, after some hesitation, have been forced to the conclusions: (1) That the order made by the court setting aside the so-called execution is without force or effect; (2) that the further order of the court by which it ordered the officer not to sell the property in question was in excess of its power, and hence void and of no effect; and (3) that if the defendants had, or have, any remedy it is not by a motion by which they merely assail the order of sale, but they must, in some proceeding, assail the original order and judgment by which the property was surrendered by the court to the petitioner for the special purpose disclosed by the record and the judgment in which the court specially directed the officer to sell the property. We are of the opinion, therefore, that the pretended order of judgment of the district court quashing said order of sale or so-called execution and restraining the officer from selling said property should be, and it accordingly is hereby, annulled, set aside, and held for naught. The petitioner to recover costs.

STRAUP, C. J., and McCARTY, J., concur.

In Re JENSEN'S ESTATE. GREEN v. JENSEN.

No. 2096. Decided April 29, 1910 (108 Pac. 927).

WILLS—PROBATE—NATURE OF PAPER. Decedent wrote a letter to petitioner, discussing in a general way their plans after they were married, stating therein that he would make petitioner his sole heir whether they were married or not, and if he died before they were married would make her his legal heir, but "I hope I will enjoy your company and association before that, now this is only talk. I don't expect to die, but I am just telling you what I mean." *Held*, that the letter was not intended as a present disposition of decedent's property but merely expressed an intention to dispose of it at some future time, and was not admissible to probate as a will. (Page 430.)

Appeal from District Court, Fourth District; *Hon. J. E. Booth*, Judge.

Petition by Millie Green against Jens Jensen to probate an alleged will.

From a judgment denying probate, proponent appeals.

AFFIRMED.

Decided April 29, 1910.

Hansen & Meredith (*Goodwin & Van Pelt*, of counsel), for appellant.

John T. Pope (*M. M. Warner* of counsel), for respondent.

FRICK, J.

The appellant filed her petition in the district court of Uintah County, Utah, and with it presented for probate a certain writing which she alleged was the last will and testament of one John Jensen, late of Uintah County, deceased. The alleged will was in the form of a letter written by the

deceased and directed to the appellant, who was his fiancée. The letter in full is as follows: "John Jensen & Co., Dealers in Miners' and Ranchers' Supplies. Dragon, Utah, Jan. 26, 1909. My Dear Millie: I had just written a letter to you when I received your most interesting letter I ever got from you. I am glad to hear that you favor our union this spring. Yes, my dear Millie, we will try to get our union sealed as soon as we can. I need you here and I want you here to comfort me and be a helpmate to me, and that we both may be benefited and blessed. (This is a kiss.) I am surprised to see your thoughts correspond with mine. You need not worry about your travel across the country. I will come and get you, and we will go right on to Salt Lake and back to Dragon and never mind the reception, we will have that some other time. I appreciate your sentiments and I am fully in sympathy with them, as I am with all you propose, but we must economize as much as we can. We are not millionaires and you and I must live, and so we will make things match as much as we can, and when we get well off then we will spread it on (do you see). Sweet Millie, I do not know if you like this or not, but I think you a sensible girl. I will make you my sole heir whether we get married or not, and if I die before you and me are married, I will make you my legal heir, but I hope that I will enjoy your company and association before that, now this is only talk. I don't expect to die, but I am just telling you what I mean. If we were together we could talk all this thing face to face—I will be other there some time this spring. I will let you know later and we will arrange things. We may get married in Vernal, and then go to Salt Lake City, but I have to see the Stake President about that. You just keep your ears stiff and trust in the Lord. Pray for me and yourself and we will be all right. Yes, my dear, I hope all saloons will be closed and whiskey banished from the face of the earth. You shall not think that those post cards is of any consequence. It was only to show you what the store looks like. I will send you some more to show you Dragon from different points. We don't want to stay here all

our lives, but we will stay here till we can do better or worse. I like to make a few dollars and go in the chicken business. God bless you, my dear Millie. From your loving John." The district court held that the writing was not intended as a will, and that, in legal effect, it was not such, and hence refused to admit it to probate, and entered judgment accordingly. The appeal is from the ruling and judgment.

It is urged that the district court erred in its conclusions and judgment. Conceding, for the purposes of this decision, that the writing in question is in form and execution sufficient as a holographic will under the provisions of section 2736, Comp. Laws 1907, yet the writing lacks the elements of substance which are requisite to constitute it a will whether holographic or regular. It is manifest, from the face of the writing itself, that the writer did not intend it as constituting a disposition of his property, or any part of his property. True, the writer says, "I will make you my sole heir, . . . and if I die before you and me are married I will make you my legal heir." These are the only words that even the most liberal constructionist could claim had any tendency towards manifesting an intention on the part of the writer to make a post mortem disposition of property. It is, however, clear from the language used that the writer did not intend to presently bequeath or devise any property, but that he merely expressed an intention to do so at some future time. This is not only the unavoidable conclusion to be deduced from the language itself, but such a conclusion is fortified by the fact that the writer does not mention or specify any property of any kind whatever. If the writer had intended the letter as a present disposition of his property, or any part of it, he no doubt would have said something about property of some kind. To our minds it is very clear that the letter in question was not intended as a will, but that it was intended for what it purports to be, namely, a letter by which the writer communicated his thought and plans, in a general way at least, to one with whom it was his intention to estab-

lish the closest social relations in the near future. Such a writing, therefore, falls far short of being a present disposition of property.

The judgment is therefore affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

EVANS et al. v. OREGON SHORT LINE RAILROAD COMPANY.

No. 2103. Decided April 29, 1910 (108 Pac. 638).

1. **DEATH—DAMAGES—ADMISSIBILITY OF EVIDENCE.** Under Comp. Laws 1907, sec. 2912, providing that in a death action such damages may be given as under all the circumstances may be just, in connection with evidence that decedent had contributed to his family for support and maintenance, the wife and children may also show his affection for them, his disposition and deportment towards them, his counsel and advice and his care and solicitude for their welfare, in so far as such things were made effective by his acts, as bearing on the amount of damages. (Page 437.)
2. **DEATH—ADMISSIBILITY OF EVIDENCE—CONDUCT OF DECEASED TOWARD FAMILY.** That a physician testifying to decedent's kind treatment of his wife on specific instances did not come into daily contact with the husband and wife, and therefore was unable to testify to their daily conduct towards each other for a connected period of months or years, did not affect the admissibility of his testimony, but merely went to its weight. (Page 437.)
3. **APPEAL AND ERROR—OBJECTIONS BELOW—SUFFICIENCY.** Where defendant in the lower court objected to evidence as not proper for any purpose, it could not on appeal urge an additional specific objection. (Page 438.)
4. **DEATH—ADMISSIBILITY OF EVIDENCE.** Where a physician testifying to the physical condition of decedent's widow in a death action stated that "she has been an invalid for nearly four years and suffers from a paralytic stroke on her right side," his further statement that she is almost unable to help herself, has had to be taken care of ever since she was paralyzed, cannot do any housework to amount to anything, but goes around the house unable to do much because

she has lost the use of her right limb, though in form referring to her condition at the time of trial, in fact referred to such condition at a time prior to decedent's death. (Page 438.)

5. **DEATH—ACTION—ADMISSIBILITY OF EVIDENCE.** In a death action for the benefit of decedent's widow and children under Comp. Laws 1907, sec. 2912, giving such damages as under all the circumstances may be just, evidence as to the poor physical condition of the widow, her inability to do housework, and the necessity for caring for her was admissible on the question of damages.¹ (Page 440.)
6. **TRIAL—REFUSAL OF REQUESTS—INSTRUCTIONS INCORRECT IN PART.** It is not error to refuse a charge faulty in part. (Page 443.)
7. **DEATH—MEASURE OF DAMAGES—CONTRIBUTIONS OF DECEDENT TO FAMILY SUPPORT.** If the true basis for recovery in a death action of what might be found that decedent would probably have contributed to his family, either for their support or as an addition to his estate, be the present value thereof, the discount should be made only from the time that it was found that such contributions would have been actually made had decedent lived, and not at the end of decedent's expectancy. (Page 445.)
8. **TRIAL—INSTRUCTIONS—BURDEN OF PROOF.** Charges that it is the presumption of law that every man exercises due care for his own safety when in a place of danger, and the presumption is that decedent did so when he approached the crossing, and that plaintiffs need not affirmatively prove that decedent looked and listened for the train before coming upon the crossing, the presumption being that he did so, and that the burden of proof that he did not was on defendant and must be proved by a preponderance of the evidence, merely amounted to charges that the burden of proof upon the plea of contributory negligence was upon defendant, and, unless such negligence was established by a preponderance of the evidence, plaintiffs must prevail as to that issue, and did not place a presumption in the balance to be weighed by the jury against the evidence in support of defendant's plea of contributory negligence. (Page 447.)
9. **TRIAL—REFUSAL OF REQUESTS—REQUEST EMBRACED IN CHARGE GIVEN.** It is not error to refuse a charge embraced in instructions given. (Page 448.)
10. **RAILROADS—CROSSING ACCIDENT—INSTRUCTIONS.** In an action for the death of one killed at a railroad crossing, a charge that, though a railroad company may comply with the statutory requirements of ringing the bell or sounding the whistle in approaching a public crossing, yet it can nevertheless be negligent in failing to adopt

¹ Spiking v. Con. Ry. & P. Co., 33 Utah, 339, 93 Pac. 847; Pool v. Southern Pac. Ry. Co., 7 Utah, 303, 26 Pac. 654.

such other reasonable measures for public safety as common prudence may dictate, considering the danger, travel, and surrounding circumstances, was not erroneous as authorizing the jury to speculate and base a verdict upon anything which in their judgment defendant ought to have done or omitted to do to prevent accidents at the crossing, where the court also charged that, before plaintiffs could recover, they should satisfy the jury by a preponderance of the evidence that some one of the negligent acts alleged in the complaint caused decedent's death, and, if they were so satisfied, their verdict should be for plaintiffs, unless they found that defendant had established its defense of contributory negligence, but simply stated an abstract proposition of law and gave a general definition of negligence. (Page 449.)

11. **APPEAL AND ERROR—REVIEW—INSTRUCTIONS.** That instructions are long, and to some extent repeated, and hence to that extent unnecessary, will not affect the verdict or judgment otherwise without prejudicial error. (Page 449.)

Appeal from District Court, First District; *Hon. W. W. Maughan*, Judge.

Action by Samuel R. Evans, and another administrator of Jesse J. Price, against the Oregon Short Line Railroad Company.

Judgment for plaintiffs. Defendant appeals.

AFFIRMED.

P. L. Williams, Geo. H. Smith and F. K. Nebeker for appellant.

Powers & Marioneaux and *Geo. Q. Rich* for respondents.

APPELLANT'S POINTS.

This court has uniformly held that the pecuniary loss arising from various elements of damage, is the sole measure of the damages recoverable in such an action as this. (*Webb v. D. & R. G. R. R. Co.*, 7 U. 17; *Chilton v. U. P. R. R. Co.*, 8 Utah, 47; *Corbett v. O. S. L. R. R. Co.*, 25 Utah, 449;

Beeman v. Martha Washington Co., 23 Utah, 139.) The office of a presumption is simply to serve until evidence of the fact which the presumption supposes is adduced. (Elliott on Evidence, sec. 91; *Golinvaux v. Burlington C. R. & N. R. Co.*, 101 N. W. [Ia.], 465, 467; *Waldron v. Boston & M. R.*, 62 Atl. [N. H.] 443; *Mynning v. Detroit L. & N. R. Co.*, 35 N. W. [Mich.] 811, 812; *Reed v. Queen Anne's R. Co.*, 57 Atl. [Del.] 529-532; *Winter v. Knights of Pythias*, 69 S. W. [Mo.] 662; *Burk v. Walsh*, 92 N. W. [Ia.] 65, 66; *Keller v. Over et al.*, 20 Atl. [Pa.] 25; *Meyers v. Kansas City*, 18 S. W. [Mo.] 914.) It is incumbent upon a traveler to exercise such care as to make the act of looking and listening reasonably effective. (*Washington, etc., R. Co. v. Lacey*, 94 Va. 460, 26 S. E. 834, 839; *McCanna v. New Eng., etc., R. Co.*, 2 R. I. 439, 39 Atl. 891-892; *Comkling v. Erie R. Co.*, 63 N. J. Law, 338, 43 Atl. 666; *Schomolze v. Chicago, etc., R. Co.*, 83 Wis. 659, 53 N. W. 743, 54 N. W. 106; *Urias v. Pa. R. Co.*, 152 Pa. St. 326, 25 Atl. 566.)

RESPONDENTS' POINTS.

The right of the wife to the society and protection of the husband, and the right of the husband to the society and services of the wife are regarded as the property of the respective parties. (*Warren v. Warren*, 89 Mich. 123; *Spil-ing v. Consolidated Railway & Power Co.*, 33 Utah, 339, 93 Pac. 847; *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 277; *Denver, etc., Tramway Co. v. Tiley* (Colo.), 59 Pac. 476; *C. St. L. & T. R. Co. v. Johnson*, 78 Tex. 536; *Furnish v. N. P. R. Co.*, 102 Mo. 669.) The damages awarded were not excessive. (*Sternfels v. Met. Street Railway Co.*, 77 N. Y. Supp. 309, 174 N. Y. 562; *Lane v. Brooklyn Heights R. R. Co.*, 85 App. Div. [N. Y.], p. 85, 82 N. Y. Supp. 1057, 178 N. Y. 623; *International & G. N. R. Co. v. McVey* [Tex.], 81 S. W. 991, 85 S. W. 34; *Texas Loan Agency v. Flemming* [Tex.], 46 S. W. 63; *Galveston H. & S. A. Ry. Co. v. Davis* [Tex.], 65 S. W. 217; *Louisville & N. R. Co. v. Shibell's Adm.*

[Ky.], 18 S. W. 944; *Galveston H. & S. A. Ry. Co. v. Perry* [Tex.], 85 S. W. 62; *Chesapeake, O. & S. W. R. Co. v. Hendricks* [Tenn.], 13 S. W. 696; *Ericius v. Brooklyn Heights R. Co.*, 71 N. Y. S. 596; *Reilly v. Brooklyn Heights R. Co.*, 72 N. Y. S. 1080; *Ft. Worth & R. G. Ry. Co. v. Kime* [Tex.], 51 S. W. 558; *E. L. & R. R. Ry. Co. v. Smith*, 65 Tex. 167; *Chesapeake & O. Ry. Co. v. Dickerson's Adm.* [Ky.], S. W. 615.) This court had held that in determining the amount of damages for death by wrongful act it is proper for the jury to consider the number and ages of the members of decedent's family, the loss of his society and companionship, his habits in regard to supporting his family and what he might be expected to do in the future, expressly excluding mere mental suffering. (*Pool v. S. P. Co.*, 7 Utah, 303, 26 Pac. 654; *Webb v. D. & R. G. Ry.*, 7 Utah, 17, 24, Pac. 616; *Wells v. D. & R. G. Ry. Co.*, 7 Utah, 482, 27 Pac. 688; *Chilton v. U. P. Ry.*, 8 Utah, 47, 29 Pac. 963; *Corbett v. O. S. L.*, 25 Utah, 449, 71 Pac. 1065; *Hyde v. U. P. Ry. Co.*, 7 Utah, 356, 26 Pac. 979; *Beaman v. Martha Washington Co.*, 23 U. 139, 63 Pac. 631; *Rogers v. R. G. W. Co.*, 90 Pac. 1075; *Spiking v. Consolidated Ry. & Power Co.*, 93 Pac. 847.)

FRICK, J.

This is an action by respondents, as administrators of the estate of one Jesse J. Price, deceased, to recover damages which it is alleged resulted from his death to his surviving widow and eight minor children, for whose benefit the action was prosecuted. Jesse J. Price was killed on the 19th day of September, 1907, in a collision with a passenger train of appellant while attempting to cross its railroad track with a team and wagon at a public road crossing in the town of Richmond, Cache County, this state, and it is alleged that the collision and death of said Price was caused by the negligence of the appellant. The alleged acts of negligence, briefly stated, are: (1) Excessive speed of the train; (2) failure to keep a proper lookout before reaching the crossing by defendant's servants; (3) permitting weeds, willows, and

other obstructions to grow and remain on appellant's right of way at or near a public crossing; and (4) failure to sound the bell, blow the whistle, or give any other warning of the approach of the train. The case was submitted to a jury, who returned a verdict for respondents in the sum of \$15,300. The court entered judgment on the verdict, from which this appeal is prosecuted.

While the errors assigned are numerous, we shall only consider those that are relied on and are argued in the brief of appellant's counsel. In order to avoid repetition, we shall state the facts, so far as deemed necessary, in connection with the discussion of the several assignments. Appellant asserts that the court erred in admitting certain evidence respecting the relations existing between the deceased and his wife, one of the beneficiaries of this action, as testified to by the family physician of the deceased as the physician had observed the decedent's conduct some nine or ten months preceding his death. The substance of the evidence, which is correctly stated by counsel for appellant in their brief, is as follows: "I observed that Mr. Price's treatment of his wife was most kind—beyond the average. He had to help dress her and attend to her. He attended to her as a trained nurse would have done. I have never seen a man who would attend to a woman as kindly and as well as he did. He assisted to dress her, and during the confinement, he gave me every assistance a man could. Mr. Price was a perfect specimen of manhood. He was robust, healthy, and strong. He was a well preserved man in every way." The contention is that this evidence should have been excluded upon the objection of counsel, which was upon the ground that the evidence is "immaterial, incompetent, and irrelevant." We think otherwise. Section 2912 of the Compiled Laws of the State of Utah of 1907, upon which this action is based, so far as material to the particular objection now under consideration, reads as follows: "In every action under this and the preceding section such damages may be given *as under all the circumstances of the case may be just.*" (Italics ours.) The question, therefore,

is not merely whether a wife has lost a husband or a child a father, who in a mechanical way provided for their support from his earnings or other means. We think that, in connection with the evidence showing what the deceased has contributed to the family for support and maintenance, the wife and children may also show the affection the deceased entertained for them, his disposition and deportment toward them, his counsel and advice, and his care and 1 kindly solicitude for their welfare in so far as these things were made effective by his acts, and that the jury may consider all these things in connection with the evidence of the amount the deceased contributed for support, as aforesaid, in arriving at the amount which the widow and minor children shall receive as compensation for the injury sustained by them by reason of the death of the husband and father. We are of the opinion, therefore, that the court committed no error in overruling the objection and in admitting the evidence referred to.

It is, however, urged that the evidence was irrelevant and improper in any event, because the doctor's testimony referred to a specific instance or act relative to the deportment and disposition of the deceased, and to a time long prior to his death. The objection as stated above, however, was hardly broad enough to challenge the attention of either opposing counsel or court to this precise point. Assuming, however, for the purposes of this decision, that the objection was sufficiently broad, we are still of the opinion that the evidence was properly admitted. This objection, in any event, goes to the weight of the evidence rather 2 than to its competency. There is no other way by which the decedent's affection, conduct, and treatment of his family could have been shown except as it was done, and the mere fact that the doctor did not come into daily contact with the husband and wife and was thus unable to testify to their daily conduct toward each other for a connected period of months or years in no way affected the admissibility of the testimony.

The next error assigned by appellant is very closely related to the one just discussed. This assignment relates to the admission of evidence relative to the physical condition of the widow of the deceased. The objection made to this evidence as disclosed by the record is "that it is not a proper element of damages." The court overruled the objection, and counsel saved an exception. The testimony given by a Mrs. Dent in brief is as follows: "Well, she is almost unable to help herself. She has had to be taken care of ever since she was paralyzed. Now she can't do any housework to amount to anything. She goes around the house and attempts to do some things, but not very much, because she has lost the use of her right limb." It is contended that the testimony should have been excluded upon the grounds: (1) Because it is not proper for any purpose; and (2) because the witness in describing the widow's physical condition did not limit her statement to a time anterior to the death of the deceased. A conclusive answer to the second ground of objection is that it is unavailing because this specific ground of objection was not stated at the time of trial, 3 but the general objection that we have given only was interposed. If counsel at the time had called the attention of court and opposing counsel to the fact that the question did not limit the testimony to any particular time, no doubt the question would have been so framed as to obviate this objection, and, if the objection could not have been obviated and the court had nevertheless admitted the evidence over the specific objection, the ruling could then have been reviewed with fairness and justice to all concerned. In view of the state of the record and the nature and form of the objection, this may not now be done. Another answer is that the witness, just before giving the testimony before quoted, in referring to the physical condition of the widow of the deceased, said: "She has been an invalid for nearly four years, and suffers from a paralytic stroke on her right side." It is apparent, therefore, that, while the 4 statement of the witness as a matter of form referred to the wife's physical condition at the time of the trial,

the witness nevertheless, in fact, referred to such condition at a time long prior to the death of the deceased. For these reasons the second ground of objection cannot be sustained.

Recurring now to the first ground of objection, it must be conceded that upon this point the authorities are in conflict. If, however, the cases are critically examined, and the statutes on which the decisions are based are kept in mind, the conflict among the courts will be found to be more apparent than real. In those jurisdictions where statutes like ours, or of similar import, are in force, it will be found that the courts with few exceptions, if any, have held evidence of the character now under consideration admissible and proper to be considered by the jury in determining the amount of damages to be allowed by them. The identical question was before the Supreme Court of California in the case of *Cook v. Clay Street Hill R. R. Co.*, 60 Cal. 609. That court held that under the provisions of the statute which we have quoted evidence of the physical condition of the wife is proper. Indeed, we cannot well see how any court can logically arrive at a different conclusion, unless the peculiar provisions of our statute are disregarded. The statute clearly implies that, in order to arrive at the real injury the wife or the minor children have sustained, the jury should be advised of just what they received from the deceased by way of pecuniary aid and assistance, and also what they received from him by way of comfort, advice, and companionship. The statute seems to contemplate that a husband is not necessarily an automaton who responds to the wants of his wife and minor children in a mechanical way merely, and does no more for them than to provide for their support and maintenance. Again, it seems to be assumed in the statute that the actual disposition and inclination of men differ, and that this difference is made manifest in their family relations. One husband and father may be of great comfort to his wife and minor children, and his society and advice may be of much benefit to them, while another man may render to his family but little, if anything, in this regard, yet both may provide money, or the means of support, in the same amount

and to the same extent to their respective families. It is no doubt for this reason that the statute provides that in each case "such damages may be given as under all the circumstances may be just." If all cases were to be treated alike, and the damages were to be limited strictly to the mere pecuniary value of the loss of support and maintenance, the language of the statute, no doubt, would have been framed in accordance with the statute of Illinois, which, as we shall see, limits the recovery strictly to the pecuniary value of the loss of support sustained by the wife and minor children. True, the loss under our statute in a large sense is a pecuniary loss merely, since nothing can be recovered by way of solace for injured feelings or for mental suffering of the family by reason of the death of the husband and father. Whatever is allowed by the jury must therefore be by way of pecuniary recompense for the loss sustained by the wife and minor children, and must be strictly limited (1) to what the evidence shows the deceased contributed, and thus would probably have continued to contribute to them in money or other means by way of support and as an accumulation to his estate; and (2) to the money value of the injury suffered by the wife and minor children by reason of the loss of the advice, comfort, and society which they enjoyed prior to the death of the deceased and which would have been continued for their benefit. If the evidence is to the effect that the widow and minor children suffered no loss upon the first ground because the deceased provided neither money nor other means of support, they still may be entitled to something upon the second ground, because the society of the deceased may have been a comfort and his advice of material assistance to them. Again, a wife and children may have lost little or nothing upon either or both grounds, and the jury should then compensate them only for what they have lost, and, in case they have lost upon both grounds, they should receive compensation to the extent of their loss. The jury should be informed that any allowance they may make must be limited to what the wife and children received from the deceased upon either one or both

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grounds to which we have referred, and the jury should be admonished that in no event can the pecuniary necessities or the physical requirements of the wife or children be considered for the purpose of enhancing the damages which are caused by the negligent acts complained of. In a very late California case involving death by wrongful act, namely, *Evarts v. Santa Barbara, etc., Co.*, 8 Cal. App. 712, 86 Pac. 830, evidence of the health and physical condition of the widow was admitted seemingly without objection, and was considered as proper by the appellate court. In California the question that the health and physical condition of the dependent beneficiaries as well as the question that the real relation of husband and wife and his affection for and deportment toward, or treatment of his family, may be considered as elements of damage, seem to be settled in favor of permitting those things to be shown. As additional cases where some phase of the foregoing questions have been considered and passed on by the Supreme Court of California, we refer to the following: *Dyas v. Southern Pacific Ry. Co.*, 140 Cal. 308, 73 Pac. 972; *Beeson v. Green Mountain, etc., Co.*, 57 Cal. 37; *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 277, 42 Pac. 822, 1063; *Keast v. Santa, etc., Co.*, 136 Cal. 260, 68 Pac. 771. The question has also been considered and the view of the California Supreme Court sustained by the courts of other states, as appears from the following cases: *Hunt v. Connor*, 26 Ind. App. 41, 59 N. E. 50; *Hamann v. Milwaukee Bridge Co.*, 136 Wis. 39, 116 N. W. 854; *Baltimore & O. Ry. Co. v. Noell*, 32 Grat. [Va.], 394; *Mathews v. Warner*, 29 Grat. [Va.] 570, 26 Am. Rep. 396; *Merchants', etc., Co. v. Burns*, 96 Tex. 580, 74 S. W. 758. In *Spiking v. Con. Ry. & P. Co.*, 33 Utah, 339, 93 Pac. 847, this court in effect held to the doctrine announced in the foregoing cases in so far as that doctrine relates to the elements that may be considered by the jury in determining the amount of damages to be allowed, although the precise question now considered was not before us nor passed on. The same may also be substantially said with respect to the case of *Pool v. Southern Pacific Ry. Co.*, 7 Utah, 303, 26

Pac. 654. The Virginia Supreme Court of Appeals, under a statute no broader than ours, as appears from the foregoing cases, carries the doctrine even farther, and permits a recovery by way of solace for injured feelings. No other court, so far as we know, however, goes to this extent. It should be stated, however, that under the Virginia statute \$10,000 is the limit of recovery. In Indiana, as appears from the cases referred to, and other cases there cited, in addition to a recovery for the value of the daily contributions for support made by the deceased, his wife and children may also recover for "the value of his personal services in the superintendence and care of his family, the education of his children, and the performance of acts of paternal assistance to which he would be legally obligated and which might be reasonably expected." It may also be shown "that one of the children of the deceased is afflicted with a permanent disability." In the cases which we have cited others are referred to as supporting the doctrine we here invoke, but we shall not refer specially to those cases.

Appellant has also referred us to cases which hold that evidence of the health or physical condition of the wife or child is not relevant to any issue, and hence not admissible for any purpose. One of the leading cases cited by counsel is *Chicago, etc., Ry. Co. v. Woolridge*, 174 Ill. 330, 51 N. E. 701, 13 A. & E. R. R. cases (N. S.) 501, in which the other Illinois cases are cited, and to which we shall make no separate reference. The Illinois cases, are however, all based upon a statute which the Supreme Court of Illinois has held strictly limits the recovery in cases of death through negligence to the money value of the loss of support and maintenance. The Illinois cases, as well as all others that are based on similar statutes, are therefore not of controlling influence under a statute like ours. The case of *Seattle, etc., Co. v. Hartless*, 144 Fed. 379, 75 C. C. A. 317, is, however, based upon a statute similar to ours, but notwithstanding that fact the Illinois cases are followed by the Federal Court of Appeals of the Ninth Circuit, as appears from the case just referred to. In the *Hartless Case*, *supra*, the following cases are cited, none of which sustains

the ruling in that case. *Alabama G. S. R. Co. v. Carroll*, 84 Fed. 772, 28 C. C. A. 207, was an action for personal injury. The action was prosecuted by the injured person, and it was held that evidence of his poverty was immaterial and inadmissible. *Chicago & N. W. Ry. Co. v. Bayfield*, 37 Mich. 204; *National Biscuit Co. v. Nolan*, 138 Fed. 6, 70 C. C. A. 436, and *Pennsylvania Co. v. Roy*, 102 U. S. 456, 26 L. Ed. 141, also cited in the Hartless case, were all cases involving actions for personal injuries which were prosecuted by the injured persons to recover the damages sustained by reason of injuries inflicted upon them. In all those cases it was in substance held that neither the family relations nor the financial condition of the injured person was relevant or material. This, no doubt, is sound doctrine. One cannot well see how the injured person's financial straits could have any effect upon the damages he may have sustained by reason of the injuries inflicted upon him. Nor are the members of his family before the court, or entitled to consideration, in such an action. Whether his family be large or small, or whether he has one, is entirely immaterial in determining the amount of damages he should be allowed for the injuries he has sustained either to his person or to his business, or otherwise. The other cases cited by the court in the Hartless case, *supra*, have no bearing upon the question now under consideration whatever. All that is decided in them is that improper evidence admitted upon a material issue tried to a jury ordinarily is sufficient ground for reversal. Under statutes like ours, we think the weight of authority is clearly in accordance with the ruling of the trial court. This assignment therefore must be overruled.

If the foregoing conclusions with respect to what constitutes proper elements of damages are sound, then the next assignment, namely, that the court erred in giving the instruction on the measure of damages, must also be determined against appellant's contention. The in- 6
struction complained of is very long and substantially conforms to the views hereinbefore expressed. In

view that we have already substantially covered the subject no further comment is necessary.

It is also asserted that the court erred in refusing to charge the jury as requested by appellant in its request No. 11. In view that appellant's counsel specially rely upon this request we give it in full. The request is as follows: "In determining the amount of damages, if any, in a case like this, with reference to the earning capacity of the deceased, the jury will understand that the calculation is not to be made upon the basis of the total amount of probable earnings, but only upon such portion of these earnings as would probably have gone to the benefit of the plaintiffs in this case if the deceased had lived and acquired such earnings, but, when you determine what percentage or proportion of the probable earnings would have gone to the benefit of these plaintiffs, you have no right to award them in your verdict now the sum total that such proportion would amount to at the end of deceased's expectancy. All that the plaintiffs would be entitled to in the verdict so far as his future earnings and contributions go to constitute damages would be the present value of what would amount to such total sum at the end of such expectancy. You will consider all the evidence in the case to determine what such present value would be, and you must not award anything in excess of such present value. The measure of damages for the loss of human life, resulting from negligence, so far as future earnings and contributions go to constitute damages, is the present value of the contributions made by the deceased to the beneficiaries, ascertained by deducting the cost of his living and expenditures, from the net income, and no more can be allowed than the present worth of accumulations arising from such net income, based upon the expectancy of life. That is, having ascertained the total sum, its payment must be anticipated and capitalized, and no more than the present worth thereof can be awarded in damages." That this instruction fails to include all the elements that the jury may consider in determining the amount to be allowed under our statute we think is already made clear. The principal

contention, however, is that the court erred in refusing the instruction upon the ground that it is the only direction to the jury limiting the amount of the recovery to the present value of what the jury may find that the deceased would probably have contributed to his family either for their support or as an addition to his estate. If we should concede that the present value rule should be taken as the true basis, as urged by counsel, yet the court did not err 7 in refusing the particular instruction, because, as we have seen, it was faulty in other respects; but the instruction was properly refused, even though the present value rule were to be rigorously enforced, as an analysis of the instruction will demonstrate. With regard to the probable contributions to the beneficiaries by the deceased out of his probable earnings, the court in the request is asked to charge the jury that they should take the total sum of such contributions as if made at the end of the deceased's expectancy of life, and then calculate the present value or such total sum. It is evident that under any circumstances, such a rule would not be a correct measure of damages, but the discount should be made only from the time that it is found that such contributions would have been actually made by the deceased to the beneficiaries had he lived. For example, if the jury found that out of the earnings of the deceased he would have contributed to the beneficiaries an annuity of one hundred dollars from the time of his death for thirty years thereafter (the probable period of life), the present worth of such an annuity, payable at the end of each year for a period of thirty years, discounted at the rate of five per cent. per annum compound interest would be substantially the sum of \$1537.20; while, if the jury were to follow the instruction requested and they had assumed such contributions to amount to \$3000 payable at the end of thirty years expectancy, the present worth of such sum of \$3000 so payable, discounted at the same rate before stated, would amount to only \$693. In the foregoing illustration the contributions are assumed to be made annually by the deceased to his family. In actual family life all know that the contributions by the

husband and father (except the accumulations to his estate) are made either daily, weekly, or, at least, monthly. But, in addition to such contributions, the husband and father may, and usually does, render assistance to his family in other ways than by merely making contributions in money for which the family, in case of his death, is entitled to be compensated, and the amount they should receive therefor is usually a matter which to a large extent at least must be left to the jury. In view of the complications which arise in such cases, it is apparent why some courts have refused to adopt the mathematical present value rule. In view of the foregoing, it follows that it becomes unnecessary to pass upon the question whether in this jurisdiction, in view of the provisions of our statute, the present value theory should prevail or not, and we do not pass upon that question.

We are not unmindful of appellant's contention that the large amount allowed by the jury in this case is probably attributable to the admission of the evidence objected to, the instruction on the measure of damages complained of, and the failure of the court to limit the recovery to the present value of whatever pecuniary contributions the deceased would probably have made for the benefit of his family. Even if counsel's theories were correct, these things, for the reasons we have stated, could not legally affect the verdict and judgment. But the amount allowed by the jury (which we fully concede is quite large) can readily be accounted for upon all the facts and circumstances that were before the jury upon the question of damages. While the earnings of the deceased and his savings up to the time of his death were perhaps not extraordinary, yet, in view that he was in the very prime of life, that he was a man of frugal and temperate habits, his splendid physical health, his past experience, his general conduct towards his whole family, and his ministrations, advice, and assistance to them when either sick or well, as disclosed by the evidence, makes this case an exceptional one in so far as the amount of damages is concerned. In our opinion the explanation of the large sum allowed is to be found in the things that we have just

enumerated rather than in the grounds assigned by counsel as aforesaid.

Appellant also insists that the court erred in giving the following portions of instructions, to wit: "It is the presumption of law that every man exercises due care for his own safety when in a place of danger, and the presumption is that the deceased did so when he approached the crossing." And, further, the following: "The court instructs the jury that the plaintiffs need not affirmatively prove that the deceased looked and listened for the train before coming upon the crossing. The presumption is that he did so, and the burden of proof that he did not is on the defendant railway company, and it must be proved by a preponderance of the evidence." It is conceded by counsel for appellant that those excerpts, in the absence of all evidence, do correctly state an abstract rule or proposition of law, but it is urged that it was error to give them in this case, because there were eye-witnesses to what occurred just before and at the time of the collision, and hence, it is contended, there was nothing left upon which a legal presumption could operate. It is further strenuously insisted that in view that appellant in its answer set up and relied on the plea of contributory negligence, and since the evidence upon that plea was before the jury, therefore the respondents could not be permitted to throw the presumption referred to in the instruction into the balance to be weighed by the jury against the evidence in support of appellant's plea of contributory negligence. Had the court done this by giving the instruction complained of, the contention of counsel would be sound. This is well illustrated by the authorities cited by counsel in support of their contention. But we are of the opinion that such was neither the intended nor the natural effect of the language used by the court in the two instructions quoted from above. What was said by 8 the court was, in effect, no more than to call the jurors' attention to the fact that the burden of proof upon the plea of contributory negligence was upon appellant; and, unless such negligence was established by a pre-

ponderance of the evidence upon that subject, then the respondents must prevail as to that issue. Similar instructions were assailed in the same way in *Steele v. Northern Pacific Ry. Co.*, 21 Wash. 287-302, 57 Pac. 820, and in *Baltimore & O. Ry. Co. v. McKenzie*, 81 Va. 77. By referring to those cases, it will be seen that instructions given in the manner and form as those complained of do not come within the objection passed on in the cases referred to by counsel for appellant. We are of the opinion, therefore, that this assignment should be overruled.

The criticism with respect to the tenth instruction is in our judgment without merit. The construction that counsel seemingly place upon that instruction is entirely too narrow, and we are satisfied that the jury were not misled by the language used by the court.

Nor did the court err in refusing the defendant's request No. 8 with respect to the duty of deceased before attempting to cross the railroad track. The law upon this feature of the case was sufficiently and correctly 9 stated in other instructions, and hence the court did not err in its refusal to give the particular request.

The next assignment relates to the giving of instruction No. 14. In this instruction the court, in substance, told the jury that, although a railroad company may comply with the statutory requirements of ringing the bell or sounding the whistle in approaching a public crossing, yet it may nevertheless be guilty of negligence "in failing to adopt such other reasonable measures for public safety as common prudence may dictate considering the danger, travel, and surrounding circumstances." It is contended that, by this instruction, the court authorized the jury to speculate and base a verdict upon anything which in their judgment the appellant ought to have done, or omitted to do, in order to prevent this or other accidents at the particular crossing in question. We cannot assent to this contention. The court had in another instruction told the jury in explicit terms that, "before plaintiffs can recover, the plaintiffs must satisfy you by a preponderance of the evidence that some one of the negligent

acts alleged in the complaint caused the death of Mr. Price. If you are so satisfied by a preponderance of the evidence, then your verdict should be for the plaintiffs, unless you find that the defendant has established its defense of negligence upon the part of the deceased." All of the instructions must be considered together, and, when so considered, it is manifest that the criticism of counsel is really without merit. The instruction complained of, therefore, simply and correctly stated an abstract proposition 10 of law, and gave a general definition of what would constitute negligence. The jury must have understood that their verdict must be based upon one or more of the acts of negligence charged in the complaint, all of which were also set forth in the instructions, and their attention was especially directed to them as we have shown. It may be true that it was not necessary to give the instruction in question, but it is likewise true that it was not necessary to give quite a number of instructions which were given at the instance of both parties, some of which we have alluded to and others we have not. The instructions are very voluminous and cover every possible theory of both sides. Some of them are necessarily repetitions to some extent. It is apparent that the court gave many of the requests of counsel on both sides, and in that way some of the matters complained of crept into the record. The mere fact that instruc- 11 tions are long and to some extent repeated, and hence unnecessary, cannot be permitted to affect the verdict or judgment which is otherwise without prejudicial error. We are of the opinion that the jurors were not misled by anything that is contained in the instructions, nor do we think the respondents obtained any undue advantage or that the appellant was in any way prejudiced by anything that was omitted from the instructions.

The last assignment to be noticed relates to the refusal of the court to direct a verdict for appellant in accordance with its request. It is vigorously insisted that this case comes squarely within the principles laid down by the majority of

this court in *Wilkinson v. O. S. L. Ry.*, 35 Utah, 110, 99 Pac. 466. In that case, in the opinion of this court, the evidence admitted of but one conclusion, which was that, if the injured person had looked at all before entering upon the crossing, he would have seen the approaching engine, and hence easily could have avoided the collision and consequent injury to himself. It was a clear case, therefore, of contributory negligence on the part of the traveler, which, in the judgment of this court, was inexcusable as a matter of law. In view of this there was nothing to submit to the jury. In the case at bar we, however, cannot say as a matter of law that the deceased was guilty of negligence in attempting to cross the track in view of all the facts and circumstances involved. Nor can we say as a matter of law that he did not look nor listen for the approaching train before attempting to cross the track. There are many circumstances which enter into a consideration of the question of the negligence of the deceased which it was proper to submit to the jury. The case is one which it was not only proper to submit to the jury upon the evidence, but it belongs to that class which it would have been error, under all the circumstances, not to have so submitted.

The judgment therefore is affirmed, with costs to respondents.

McCARTY, J., and LEWIS, District Judge, concur.

GRANT v. LAWRENCE.

No. 2119. Decided April 29, 1910 (108 Pac. 931).

1. **PROCESS—SUBSTITUTED SERVICE—EFFECT—"PERSONAL SERVICE."** Substituted service of summons if properly made by leaving copy at defendant's usual place of abode with some suitable person of at least fourteen years of age, as authorized by Comp. Laws 1907, sec. 2948, subd. 8, constitutes personal service. (Page 454.)
2. **EVIDENCE—PRESUMPTIONS—PLACE OF ABODE.** The presumption that a man's place of abode is prima facie where his family lives is one of fact, and not of law, and may be overcome by evidence to the contrary. (Page 454.)

3. PROCESS—SUBSTITUTED SERVICE—"PLACE OF ABODE"—"DOMICILE." Plaintiff in May, 1884, was married to A., and, while she was still his wife, during the same month he married E., she being his plural wife. Thereafter he went to England as a missionary, and took with him his wife E. and her children, and resided and worked there. During his absence in England, his wife A. built a house in Salt Lake City with money furnished by plaintiff, and during plaintiff's absence lived therein. Plaintiff never saw the house nor lived in it until after his return from England, during which time summons was attempted to be served on him in an action brought by defendant by leaving a copy at such house with his wife A., on which judgment was rendered against him by default, concerning which he had no knowledge until he returned from England. *Held*, that such house was not plaintiff's "usual place of abode" within Comp. Laws 1907, sec. 2948, subd. 8, authorizing substituted service by leaving a copy of the process at the defendant's usual place of abode with a suitable person at least fourteen years of age; the term "place of abode" as so used being the place where defendant lives or abides, his "then present residence," and is not synonymous with "domicile." (Page 456.)

Appeal from District Court, Third District; *Hon. C. W. Morse*, Judge.

Action by Heber J. Grant against Franklin Lawrence.

Judgment for plaintiff. Defendant appeals.

AFFIRMED.

C. S. Patterson for appellant.

Young & Snow for respondent.

FRICK, J.

Respondent instituted this action in equity to set aside a judgment rendered against him in a former action. The present action is based on the alleged ground that the court in the former action had no jurisdiction of the person of respondent for the reason that summons was not served upon him in that action as required by the statutes of this state. The former action was also an action in equity to quiet the title to certain real estate of which respondent claims to be the owner, or in which he has an interest.

The undisputed facts which are deemed material, in substance, are: That with the exception of two years as a resident of Tooele County, this state, and two years while on a mission in Japan, and three further years while on a mission in England (seven years in all), the respondent has been a resident of Salt Lake City, in Salt Lake County, Utah, all his life. That at the time of trial and for many years prior thereto he was engaged in the insurance business in Salt Lake City, and that there was no interruption in the conduct of said business while respondent was absent in Japan and England as aforesaid. That respondent in May, 1884, married one Augusta W. Grant, and thereafter, and while said Augusta was still living and continued to be his wife, he also married one Emily W. Grant, the latter becoming his plural wife. That, when respondent went to England, he took with him said Emily W. Grant and her six children, and she and respondent established housekeeping in the city of Liverpool, and lived together with said children as a family. That Augusta W. Grant remained in Salt Lake City, and after respondent had departed from this state, and while he was sojourning in England for the purpose aforesaid, said Augusta W. Grant erected a dwelling house at No. 174 East South Temple street, in Salt Lake City. That said house was paid for by money furnished by respondent. That said Augusta and her child during respondent's absence in England moved into said house and lived therein, but respondent had never seen the same nor lived therein when the summons hereinafter referred to was served, but, when he should be released from his services as a missionary in England, he intended to, and when he returned did, go to and live with said Augusta W. Grant in said house. That on the 25th day of April, 1906, and while respondent was absent from Utah and in England as before stated, a certain action was commenced in the district court of Salt Lake County by one Franklin Lawrence to quiet the title to certain real estate in Salt Lake County, in which a judgment or decree was entered quieting the title to said real estate in said Lawrence. That respondent was

made defendant in said action, and the only service of summons that was made in him was made by one Brunner, who was not a party to said action nor an officer authorized to serve process, and, as his return made under oath shows, service was made on respondent as follows: "I further depose and say that the within summons came into my hands for service on the 25th day of April, A. D. 1906, and that on the same day I served the same as follows: On the defendant Heber J. Grant by leaving a true copy thereof at the usual place of abode of the said defendant at Salt Lake City, Utah, with Mrs. Heber J. Grant, wife of the said defendant, she being a suitable person and more than fourteen years of age." That said summons was served as aforesaid on said Augusta W. Grant at the house aforesaid, to-wit, No. 174 East South Temple street. It is also conceded that respondent had no knowledge of the entry of the judgment aforesaid until more than a year after it was entered, that the present action was commenced within a reasonable time after he had obtained knowledge of said judgment, and that said respondent, "had a probable defense to said action" to quiet title as aforesaid. Upon the foregoing facts the district court made conclusions of law, by which it was, in substance, found that the service of summons as set forth in the foregoing statement was not a legal service, and that, therefore, the district court in the action to quiet title did not acquire jurisdiction of the person of respondent. Upon these conclusions the court entered judgment setting aside the former judgment quieting the title in so far as it affected the respondent. The appeal is upon the judgment roll.

While various errors are assigned, the only ones that it is necessary to consider are that the court erred in its conclusions of law, and in entering judgment vacating the former judgment and decree. The only question is: Did the court acquire jurisdiction of the person of respondent in the action to quiet title by the service of summons made on him in the manner set forth in the statement of facts?

The service was what is usually designated as substituted service. That is, it is a substitute for service on the

defendant by delivering to him personally a copy of the summons. Such service, when properly made, in legal effect constitutes personal service under our statutes. Such a service may be made in all actions, and is not, as in some states, upon the condition that the defendant cannot be found. Section 2948, Comp. Laws 1907, provides on whom service of summons shall be made. The introductory part of the section provides: "The summons must be served by delivering a copy thereof as follows." This statement is followed by various subdivisions in which it is prescribed on whom the summons shall be served when the action is not against an individual or natural person. When the action is against a natural person, the service of summons must be made on said person as provided in subdivision 8 of said section, which must be made by delivering a copy "to the defendant personally, or by leaving such copy at his usual place of abode with some suitable person of at least the age of fourteen year." From the foregoing statement of facts, it is apparent that service was attempted to be made on respondent at his "usual place of abode." Respondent contends, and the court found, that No. 174 East South Temple street, where Augusta W. Grant, the wife of respondent, and her child, lived when the service of summons was made in the former action, was not his usual place of abode within the purview of our statute, but that at said time his usual place of abode was in Liverpool, England, where he lived with Emily W. Grant and the children as aforesaid. The question of what constitutes or what is intended by the phrase "usual place of abode" is not always free from doubt; and the courts have arrived at different conclusions, depending somewhat however, on the nature of the proceeding and the subject-matter which gave rise to the decisions. It may be accepted that as a general rule a man's place of abode, *prima facie* at least, is presumed to be where his family lives. (10 A. and E. Ency. L. [2 Ed.] 23; *Missouri K. & T. Trust Co. v. Norris*, 61 Minn. 25, 63 N. W. 634.) "This presumption, however, is one of fact and not of law, and may be overcome by evidence showing the fact to be

otherwise." (10 A. and E. Ency. L. [2 Ed.] 24; *Schla-
wig v. De Peyster*, 83 Iowa, 323, 49 N. W. 843, 13 L. R.
A. 785, 32 Am. St. Rep. 308; *Wolf v. Shenandoah Nat.
Bank*, 84 Iowa, 138, 50 N. W. 561.) Usual place of abode
is sometimes referred to as being synonymous with domicile
or permanent residence. In our judgment there is a broad
distinction between domicile and usual place of abode as the
latter term is used in our statute. Such also seems to be the
conclusion reached by the authorities, as is demonstrated by
the following cases: *In Mygatt v. Coe*, 63 N. J. Law, 512,
44 Atl. 199, the Supreme Court of New Jersey, in construing
a statute authorizing substituted service in terms similar
to ours, says:

"The statute does not direct service to be made at the 'residence'
of the defendant, but at his dwelling house or usual place of abode,
which is a much more restricted term. As was said in *Stout v. Leon-
ard*, 37 N. J. Law, 492, many persons have several residences which they
permanently maintain, occupying one at one period of the year and
another at another period. Where such conditions exist, a summons
must be served at the dwelling house in which the defendant is living
at the time when the service is made."

That is, where a person abides—lives—at the particular
time when the summons is served, constitutes his usual place
of abode. A similar question was before the Supreme Court
of the United States in *Earle v. McVeigh*, 91 U. S., where,
at page 508 (23 L. Ed. 398), it is held that, where service
of summons is required to be made at the "usual place of
abode," such service, in order to constitute legal service, must
be made at the defendant's "then present residence." In
other words, at the place where the defendant then lives or
abides. The same conclusion was reached by the Supreme
Court of Missouri in the case of *Bank v. Suman*, 79 Mo. 527,
where the case of *Earle v. McVeigh*, *supra*, is reviewed and
approved.

It will be observed that in the case at bar there is no find-
ing that the respondent, before going to England, had his
usual place of abode either with Augusta W. or with Emily
W. Grant. All that appellant relies on is the fact found by

the court, namely, that respondent "was married to Augusta W. Grant in May, 1884, and afterward, in the same month, while Augusta W. Grant was still his wife, was married to Emily W. Grant." From this finding appellant contends the presumption arises that respondent lived with Augusta W., because she, as he contends, was his legal wife. We have already pointed out that the presumption that a man lives with his family is merely one of fact, and is thus a rebuttable presumption. In view, therefore, of the further finding that in the same month in which respondent married Augusta W. he also married Emily W. and in the absence of any finding with respect to where Augusta W. lived at the time of her marriage, or that she ever lived in the state of Utah, how can the presumption be indulged that respondent had in fact his "usual place of abode" with Augusta W. at any time before he went to England? The utter failure of such a presumption becomes still more apparent when we remember the conceded fact that the summons in the former action was in fact served at a place where the respondent had never made his usual place of abode. The house, as a place of abode, had no existence when respondent departed from the state, and, if it were conceded that 3 he at some time in the future intended to make it his place of abode, yet it manifestly was not such at the time the summons was served. If the court had found that at the time respondent went to England he was married to Augusta W., that she at the time was his wife, and that he actually lived with her in Salt Lake City up to the time of his departure, it might be inferred that his home continued to be at such place as she made her home in said city. Under all the facts as found, and in the absence of other findings to which we have referred, it seems to us that no presumption can be indulged in this case that at the time the summons was served in the former action respondent had his usual place of abode at No. 174 East South Temple Street in Salt Lake City. In order to so hold, the conclusion would have to be based upon a fiction which in our judgment is entirely overcome by all the facts found in the case.

Counsel for appellant has referred us to a number of cases in which, as he contends, the courts have arrived at a conclusion different from that arrived at by us. We do not deem it either necessary or profitable to review those cases at length, for the reason that all of them, except the case of *Missouri K. & T. Trust Co. v. Norris, supra*, and to which we have referred, pass upon the question of residence or usual place of abode in the light of local statutes and in connection with the pleas of the statute of limitations, or of the exercise of the franchise by a citizen, or where a claim of homestead was invoked, or where the question arose of what constituted the usual place of abode or residence of persons who were sentenced to be imprisoned at a place or county other than where they lived at the time sentence was imposed. Those cases, therefore, have but little, if any, influence upon this case, in view of the undisputed facts.

Under all the facts and circumstances of this case, we are constrained to hold that the district court committed no error either in the conclusions of law or in setting aside the judgment entered against the respondent in the former action. The judgment is therefore affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

BINGHAM LIVERY & TRANSFER COMPANY v.
McDONALD.

No. 2083. Decided April 29, 1910. Rehearing Denied, July 11, 1910
(110 Pac. 56).

1. **APPEAL AND ERROR—TRANSCRIPT—EXHIBITS.** Exhibits offered in evidence need not be incorporated in or attached to the transcript. (Page 466.)
2. **EXCEPTIONS, BILL OF—EXHIBITS.** Under Comp. Laws 1907, sec. 3284, providing that in making up a bill of exceptions, documents on file in the action may be copied or the substance thereof stated, or reference thereto sufficient to identify them may be made, referring to them by their identification marks, and stating the name and character of such instrument, is enough. (Page 467.)

3. **EXCEPTIONS, BILL OF—EXHIBITS.** Where a map, designated in the record as Plat A but marked Exhibit G for identification, was referred to by counsel when offering it in evidence as Plat G instead of Exhibit G and was during the remainder of the trial repeatedly referred to by counsel for both sides as Plat G, and the numerous references in the bill of exceptions to it as Plat G, and the fact that it is the only exhibit in the case marked "G" for identification, show Plat G and Exhibit G to be one and the same thing, the map will not be stricken from the bill of exceptions, as not identified as the map received in evidence. (Page 467.)
4. **ADVERSE POSSESSION—CONTINUOUS AND OPEN POSSESSION—EVIDENCE.** Evidence held to show possession by defendant by his use of the premises as a yard in connection with his blacksmith shop, of the continuous and open character necessary under Comp. Laws 1907, secs. 2862, 2863, for title by possession under color of title.¹ (Page 469.)
5. **ADVERSE POSSESSION—INTERRUPTION.** Where defendant used a lot as a yard in connection with his blacksmith shop and permitted teamsters, peddlers, and others, who had occasion to do so, to use it as a camp ground when this did not interfere with his own use and occupation of it, the occasional driving over it by plaintiff in going to and from its barn was not an interference with or interruption of his possession. (Page 473.)
6. **LOST INSTRUMENTS — ESTABLISHMENT — EVIDENCE.** Defendant, claiming by adverse possession under color of title, sufficiently proves the contents of a deed given him thirty years before, and since destroyed, by testimony that at such time, for a certain consideration recited and paid, the then record owner executed to him a quitclaim deed of the land, which was witnessed and acknowledged, though he cannot recite its contents.² (Page 474.)

Appeal from District Court, Third District; *Hon. C. W. Morse*, Judge.

Action by Bingham Livery & Transfer Company, a corporation, against R. D. McDonald.

Judgment for plaintiff. Defendant appeals.

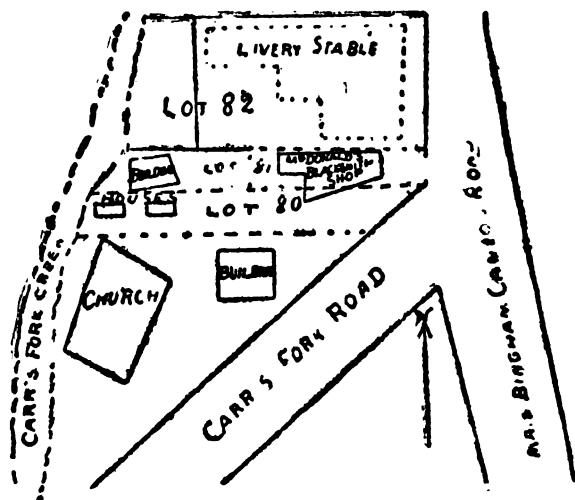
REVERSED WITH DIRECTIONS.

¹ Pioneer Investment & Trust Co. v. Board of Education of Salt Lake City, 35 Utah 1, 99 Pac. 150; Toltec Ranch Company v. Babcock, 24 Utah 183, 66 Pac. 876.

² Scott v. Crouch, 24 Utah, 377, 67 Pac. 1068.

STATEMENT OF FACTS.

Plaintiff, a corporation organized and existing under the laws of the state of Utah, brought this action against the defendant to quiet title to a certain parcel of ground described in its complaint as "situate in the town of Bingham Canyon, Salt Lake County, state of Utah, to-wit: All of lot 80 in said town of Bingham Canyon, as the same is described on Smith's survey of Main Bingham townsite." Plaintiff claimed to deraign title to the land in controversy through mesne conveyances from a United States patent called the "Valentine Patent," issued July 10, 1876, to David H. Bentley. Defendant claims the land by adverse possession in himself and his predecessors since the date of the issuance of the Valentine patent referred to, under claim of title founded upon a written instrument. The land in controversy is situated at the junction of Bingham Canyon road and Carr's Fork road, the main thoroughfares along which the town of Bingham Canyon is built. The following diagram shows the boundaries in dispute and their location, with reference to the other properties in that vicinity, and will, to some extent, aid in illustrating the questions involved.



The area of the ground in dispute is 25x100 feet, and is designated in the record, and marked on the above diagram, as lot 80. Defendant, in his counterclaim, alleged ownership to another piece of ground 30x65 feet in lot 81, contiguous to and north of lot 80. Defendant's blacksmith shop, with the exception of the southwest corner thereof, which is on lot 80, is on this 30x65 feet of ground. Plaintiff disclaimed ownership and all right of possession to the 30x65 feet of land mentioned, and that part of lot 80 upon which the southwest corner of defendant's blacksmith shop stands.

The facts upon which the respective parties rely for a recovery in this action are about as follows: Long prior to 1876 the ground represented by the diagram was used as a sawmill site and logging ground by one James Campbell under a deed from A. D. Heaton, made December 28, 1869. The sawmill stood north of the land in controversy and on what is designated in the record as lot 82. The premises lying north of lot 80 Campbell sold to parties who later on converted the buildings used in connection with the sawmill into a livery stable. In November, 1876, defendant purchased from the parties who were then in possession of the livery stable premises under a conveyance from Campbell, a piece of ground 30x50 feet in lot 81, contiguous to and north of the premises in dispute. The land lying south of this 30x50 feet and embracing lot 80 remained in the possession of Campbell, under his deed from Heaton. In 1876 defendant, after purchasing the 30x50 feet of ground mentioned, erected a blacksmith shop thereon. About the time he commenced the erection of his blacksmith shop he obtained permission from Campbell's agent and attorney in fact to occupy the 25x100 feet of ground embraced within lot 80 and to use the same as a yard for his blacksmith shop. In pursuance of the permission thus given him, defendant, in November, 1876, entered into possession of and occupied lot 80 as Campbell's tenant or licensee and used the ground embraced therein for the storing of his fuel, for the repairing of vehicles and implements, and for the storing of the same, for outhouses, and for all other purposes for which yards of this

character are generally used. Defendant continued to thus occupy the premises until 1879, when, according to his testimony, which stands uncontradicted, he purchased the land embraced within lot 80 and received a quitclaim deed thereto from Campbell. This deed, which he failed to have recorded, was lost in a fire which occurred in 1895, and which burned down his blacksmith shop and destroyed all of his books and papers. On July 10, 1876, a United States patent was issued to David H. Bentley for forty acres of land. This patent, referred to in the record as the "Valentine Patent," covers a large portion of the ground upon which the town of Bingham Canyon is built, including the premises in dispute. Soon after the patent was issued preparations were made by the occupying claimants in Bingham Canyon, including defendant, to test its validity. Bentley, the patentee, went to Bingham Canyon, and defendant informed him that he, Bentley, "had no interest in there at all." No attempt was made by Bentley, or any of his successors in interest, to take possession of the ground, and defendant has continually remained in possession of the premises embraced within lot 80, and used the same as a yard in connection with his blacksmith shop for the purposes hereinbefore mentioned. It appears that from the time defendant went into possession of lot 80 until about the time this action was commenced, plaintiff and its predecessors in interest drove over a portion of the lot in hauling hay to and manure from the livery stable. They would also occasionally leave a vehicle, when not in use, upon the premises. Plaintiff, however, does not claim any title to or easement in the property by virtue of the use thus made of it.

The claim made, if we correctly understand the position of counsel for plaintiff, is, that evidence of the use made of lot 80 by plaintiff and its predecessors tends to show that defendant was not the sole occupant of the property, and that therefore he could not, and did not, acquire title to it by adverse possession. The evidence, without conflict, shows that the use made of the premises by plaintiff and its predecessors in no way interfered with defendant's occupancy and

use of the property. George H. Davis, a witness for defendant, testified that he resided in Bingham Canyon from 1873 until the fall of 1882; that he owned and operated the livery stable mentioned; that neither he nor any one connected with the livery stable during that time claimed any title to or interest in the premises in controversy or any part thereof, and that defendant was the reputed owner of the property. The record also shows that T. R. Jones, one of the parties who succeeded to the rights conferred by the Valentine patent, and who was one of the parties through whom plaintiff derails its title, sent word to the occupying claimants of the land covered by the patent, before he parted with whatever interest he may have had in the property, that if they would get the land surveyed "he and his partners" would convey to each claimant the amount of ground claimed and occupied by such claimant that was within the patent; "that they (Jones and his partners) did not claim it."

In fact, the evidence shows that from 1876 until the commencement of this action, a period of twenty-eight years, no one interfered with defendant in his possession and occupancy of the land in question. One of plaintiff's predecessors in interest testified that he claimed to own the property from 1885 to 1898, when he sold it, in connection with the livery stable mentioned, to plaintiff; but there is no evidence that he ever asserted or made known his claim of ownership to defendant or to any other person. The land described in the Valentine patent was not assessed for taxes, nor were any of the parties connected with that title ever assessed for land covered by the patent, prior to the year 1891. In 1891 the entire forty acres covered by the patent was assessed at \$160 in the name of Bentley, the patentee, and others holding undivided interests therein with him, the total tax being \$1.39. The property was sold for these taxes. The same thing occurred again in 1892. Plaintiff in no way connects his title with these tax sales. After the year 1892, until 1896, no taxes were assessed or levied against the land as described and embraced within

the Valentine patent. From the year 1878, until 1891, defendant was assessed for and paid taxes on real estate in Bingham Canyon, but no description of the real estate was given. During these years when the assessor called on defendant for the purpose of assessing his property, defendant, in listing his property, would point out to the assessor the land claimed and occupied by him. The record shows that the assessors, in their assessments of real estate for taxes in Bingham Canyon from 1878 up to and including 1893, did not describe the property, but only gave the valuation. From 1893 until 1900 only the improvements were assessed. The taxes assessed against lot 80, "Smith's Survey" since 1900 have been paid by defendant.

The first complaint filed by plaintiff in this action (April 24, 1904) contains two counts. In the first count plaintiff claims title to the easterly portion of lot 80, and in the second count it claims ownership in common with defendant to the westerly portion. On January 15, 1907, nearly three years after filing its original complaint, plaintiff filed an amended complaint containing but one count in which it claims to be the sole and absolute owner of all of lot 80, and prays for a decree quieting its title to all of said lot. Both of these complaints, which were verified by A. V. Anderson as vice president of plaintiff company, were received in evidence.

The court found in favor of plaintiff upon the issues presented, and rendered judgment quieting its title in the property. Defendant appeals.

Weber & Olson for appellant.

Dey & Hoppaugh for respondent.

APPELLANT'S POINTS.

In the early fall of 1879, plaintiff received a deed from Campbell for the particular piece of ground embraced in Lot 80. This deed was lost by appellant in a fire which occurred in 1895, and which burned down his blacksmith

shop and all his books and papers. It was the usual form of quit-claim deed, duly made and executed before a notary public and witnesses, and all circumstances of the formal making and execution of the deed are given. The witness could not, nor could he be expected to give the exact language of the deed; if he had undertaken to do so his testimony in this respect might be open to doubt or criticism, which is impossible as to any of the testimony given by appellant in this case. James Campbell, first party, by Hugh Campbell, his attorney in fact, conveyed this ground to appellant. The deed was made in the office of Henry Thompson, a notary public in Bingham Canyon, and was subscribed to before the notary and before two witnesses, and was formally acknowledged before the notary, who duly signed his name and affixed his seal to the acknowledgment. The deed described this ground, and witness remembered that it stated that the ground conveyed was twenty-five feet in width, and that it extended westerly from Carr Fork road to the mountain and adjoined the livery stable premises on the north. It referred to posts which showed the boundaries of the ground, one post at what is shown on the plat "G" as the present southeast corner of Lot 8, Wilke's survey, being also the southeast corner of Lot 80, Smith's survey, on Carr Fork road; and one at the junction of main Bingham Canyon and Carr Fork road, being the northeast corner of Lot 80. Appellant remembered that it was in 1879 that he received this deed by reference to a book account showing that to have been the year when a fence was built along the north line of lot 80 from the rear corner of appellant's blacksmith shop to the mountain. Hugh Campbell was the duly authorized attorney in fact for James Campbell. Under this deed appellant has claimed title since 1879. This proof of the lost deed is sufficient. Proof of possession for a period of nearly thirty years under claim of title being established, very slight additional circumstances are required to establish a lost deed under which title is claimed. (*Scott v. Crouch*, 24 Utah 377; *Harbison v. School Dis.*, 89 Mo. 184; *Perry v. Burton*, 111 Illinois 138; *Parks v. Caudle*, 58 Texas 216.)

RESPONDENT'S POINTS.

Until the contents of a deed are proved the deed is not proved, and the proof should be clear and plenary. (*Lampe v. Kennedy*, 14 N. W., 43, 45; *Thomas v. Ribble*, 24 S. E., 24, 242; *Capell v. Fagan*, 77 Pa. 55; *Cunner v. Pushor*, 29 Atl. 1083; *Louisville & Nashville Railroad Co. v. Boykin*, 76 Ala. 560; *Shackleford v. Bailey*, 35 Ill. 387; *Humphries v. Huffman*, 33 Ohio State, 395 404; *Livingston v. Iron Company*, 9 Wendell, 311, 517; *Fugate v. Pierce*, 49 Mo. 441, 447.)

It is obvious where a deed containing no description of the land is relied on to give color of title that it will be ineffectual for that purpose.

(*Buswell Lim. and Adverse Possession*, p. 353.)

A deed is color of title only to the extent that the premises are described in the conveyance.

(*McEvoy v. Lloyd*, 31 Wis., 142.)

The description is the most essential part of the deed under this statute, for it determines the extent of the constructive possession arising from the actual possession of a part.

(*Wilson v. Atkinson*, 77 Cal., 485; *Murphy v. Doyle*, [Minn.] 33 N. W. 220, 221.)

McCARTY, J., after stating the facts, delivered the opinion of the court.

Respondent has filed a motion to strike from the record certain documents, consisting of plats, deeds, tax receipts, and other papers (marked Exhibits "A" to "V") that were received in evidence, on the ground "that the same are not authenticated by the clerk of the court below nor transmitted by said clerk, nor do the same constitute any part of the transcript certified on appeal by the clerk of the court below." This motion is followed by another to strike from the record the bill of exceptions on the ground that it shows on its face that it does not contain all the evidence received upon the trial; that certain documents ("A" to "V," exhibits)

introduced in evidence, material to the consideration of the errors assigned, are omitted from the bill of exceptions and the transcript. It appears that each of the documents and papers referred to in the motions to strike was produced at the trial, shown to and identified by witnesses as being the identical instrument or thing that it purported to be, marked for identification by the court stenographer, and then introduced in evidence. The references made in the transcript of the proceedings to each document, paper, or thing, introduced in evidence as an exhibit are not only referred to by their identification marks, but the name and character of each document or thing marked as an exhibit is stated in the record. It would be difficult to make a record more full and complete in this respect than the one before us, without reading the entire contents of each exhibit, consisting of written or printed matter into the record. The certificate of the judge to the bill of exceptions recites "that the above and foregoing bill of exceptions contains all of the testimony and all of the evidence given and introduced or offered upon the trial of said cause, and all of the objections and motions made with respect thereto, and all of the rulings of the court upon such objections and motions, and all of the exceptions to such rulings, and particular reference sufficient to identify all of the documentary evidence given and introduced or offered upon said trial." It is contended in support of the motions: First, that as the exhibits were neither incorporated in nor attached to the transcript on appeal, they are no part of the bill of exceptions and cannot be considered by this court; second, that the reference made to the exhibits in the certificate of the judge to the bill of exceptions is not sufficient to identify them, and to prevent this court from being imposed upon by the substitution of documents and papers not in the record for 1 those that were received in evidence, and made a part of the bill of exceptions. We think the contention is wholly without merit.

In answer to the objection that the exhibits are neither incorporated in nor attached to the transcript, it is sufficient

to say that the statute makes no such requirement, and if it did it would require something to be done which, in many cases, would be an impossibility. It is not an unusual thing for exhibits received in evidence in the trial court and used in this court on appeal to illustrate the issues, facts, and questions involved, to consist of maps, documents, and records too numerous and bulky to attach to the transcript. And in some cases exhibits consisting of models made of iron or heavy pieces of timber are brought here as part of the record on appeal. In such cases it would be impossible to incorporate the exhibits in or to make them a part of the transcript. Section 3284, Comp. Laws 1907, among other things, provides that in making up a bill of exceptions "documents on file in the action or proceeding may **2** be copied or the substance thereof stated, or reference thereto sufficient to identify them may be made." (Italics ours.) As we have observed, the references made in the bill of exceptions to the exhibits are sufficient to enable this court to readily identify them, and this is all that the statute requires in that respect.

A map showing the location of the land in dispute, with reference to streets and other properties in the immediate vicinity, and designated in the record as "Plat A," was used by both parties at the trial to help illustrate the evidence given by many of the witnesses. This map was marked "Exhibit G" for identification. In offering it in evidence counsel for appellant referred to the map as "Plat G" instead of "Exhibit G." Counsel for respondent strenuously insist that the map should be stricken from the bill of exceptions, because not identified as the map admitted in evidence. The record shows that after the map was received in evidence counsel on both sides, during the remainder of the trial, repeatedly referred to it as "Plat G." The numerous references made in the bill of exceptions to this map as "Plat G," and the fact that it is the only exhibit in the case marked "G" for identification, conclusively shows that **3** "Plat G" and "Exhibit G" are one and the same thing. The motions to strike are denied. The conclusions here

reached are fully supported by the following authorities. (3 Ency. Pl. & Pr. 430, and cases cited; 2 Spelling New Tr. and App. Pro. section 447, Elliott on App. Pro. sections 818, 819; 3 Cyc. 58.)

Appellant has assigned several errors in which he assails the findings of fact made by the court and the judgment rendered thereon. It is contended that the findings of fact are not only unsupported by, but are contrary to, the evidence. As we observed in the foregoing statement of facts, appellant claims that he acquired title to the premises in dispute by continuous, open, uninterrupted, adverse possession of the same for a period of more than twenty years under claim of title founded upon a written instrument, as provided in sections 2862, 2863, Comp. Laws 1907, which, so far as material here, are as follows:

"2862. Whenever it shall appear that the occupant, or those under whom he claims, entered into possession of the property under claim of title exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, . . . and that there has been a continued occupation and possession of the property included in such instrument, . . . or of some part of the property under such claim, for seven years, the property so included shall be deemed to have been held adversely, except that when the property so included consists of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract.

"2863. For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, . . . land shall be deemed to have been possessed and occupied in the following cases. . . . 2. Where it has been protected by a substantial enclosure. 3. Where, although not enclosed, it has been used for the supply of fuel or of fencing timber for purposes of husbandry, or for pasturage, or for the ordinary use of the occupant." (*Italics ours.*)

With the exception of a slight, unimportant change in section 2862, the foregoing has been the law of Utah since 1876. See sections 1101 and 1102, Rev. St. 1876, sections 3134 and 3135, vol. 2, Comp. Laws 1888, and sections 2862 and 2863, Rev. St. 1898.

The first point to be determined is: Does the evidence show that the appellant's possession of the premises

was of the continuous and open character contemplated by the statute? We are clearly of the opinion that it does. The evidence, without conflict, shows that from November, 1876, until the commencement of this action appellant used lot 80 as a yard in connection with his blacksmith shop, one corner of which was on said lot. He not only used this building, which contained two rooms or apartments, as a workshop, but during all these years occupied it as his residence. The room or apartment on the east and facing the street he used as a blacksmith shop and the back or west apartment as an office and living room. On this point appellant testified, and his testimony is corroborated by several other witnesses who testified in reference to the same matter, as follows: "I had need of this twenty-five feet of ground (lot 80) to the south of my blacksmith shop for repairing wagons, sleighs, and things like that. I have never had any other place for my blacksmith yard during all of the time I have been in possession there. My residence was in the blacksmith building. I slept there and batched there. I kept a stove there and had a lot of coal and firewood on the south line of lot 80 for heating tires. I left wagons and sleighs on lot 80 and did repair work there."

Appellant built an outhouse, or water closet, on lot 80 which was used as an appurtenance to his home and blacksmith shop during his occupancy of the premises. By referring to the map or diagram in the foregoing statement of the facts it will be observed that the owners of the adjoining property on the north and on the south of this lot have constructed buildings near and in some instances contiguous to the boundary lines thereof, but on no occasion have they, or any of them, so far as shown by the record, ever attempted to encroach upon the property in controversy with their improvements or in any manner interfere with appellant's occupancy of the same, until the commencement of this action. One of these buildings was constructed and maintained by respondent north of and contiguous to lot 80. In fact, the only interest respondent claimed in the west half of the lot prior to the filing of its second amended com-

plaint (January 15, 1907) was the right to use that portion of it in common with appellant. This is manifest from the fact that it is alleged in the original complaint and in the first amended complaint, both of which were verified by A. V. Anderson, vice president and secretary of the company, and who, as shown by the record, has been familiar with the facts and circumstances under which appellant claimed the property since 1898, "that plaintiff is now, and with its grantors and predecessors in interest for upwards of seven years last past has been, the owner in fee simple of the right to use and possess *in common with the said defendant, the west half of lot 80.*" And in the prayer of this complaint it is asked that it be adjudged and decreed to "be the owner in fee simple of the right to use and possess in common with said defendant of the premises hereinbefore described." In 1878 appellant built a fence along the north line of lot 80, extending from a point near the southwest corner of the blacksmith shop to the northwest corner of the lot. This fence he maintained until 1895 when it was destroyed by fire, which also burned down the blacksmith shop. Carr's Fork creek on the west, and the mountain which rises abruptly from the creek to the west, formed the westerly boundary of the lot, and we think it may be fairly inferred from the evidence that appellant, during his occupancy of the land, has paid all the taxes that have been assessed against it.

It is contended that because respondent and its predecessors in interest occasionally passed over lot 80 in hauling hay to and manure from the livery stable appellant's possession was thereby interrupted, and hence not continuous. The Supreme Court of California has repeatedly defined what constitutes "possession and occupancy" under a statute which is identically the same as the statute of this state. In *Coryell v. Cain*, 16 Cal. 573, Field, C. J., in speaking for the court, said:

"By actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation—by a substantial enclosure—by cultivation, or by appropriate use, according to the particular locality and quality of the property."

In *Wolf v. Baldwin*, 19 Cal. 313, it is said:

"Possession which is accompanied with the real and effectual enjoyment of the property" is sufficient. "It is the possession which follows the subjection of the property to the will and dominion of the claimant to the exclusion of others; and this possession must be evidence by occupation or cultivation, or other appropriate use, according to the locality and character of the particular premises."

Baldwin, J., concurring, says:

"It must, in other words, be an open, unequivocal, actual possession, notorious, apparent, uninterrupted, and exclusive, carrying with it the marks and evidences of ownership, which apply in ordinary cases to the possession of real property."

See also, *Brumagim v. Bradshaw*, 39 Cal. 24; *Webber v. Clark*, 74 Cal. 11, 15 Pac. 431; *Kockemann v. Bickel*, 92 Cal. 665, 28 Pac. 686; 1 Cyc. 999; 2 Ency. L. & P. 366.

Holtzman v. Douglas, 168 U. S. 278, 18 Sup. Ct. 65, 42 L. Ed. 466, was a case in ejectment. In that case, as here, the defense of adverse possession was interposed. The use made of the premises in that case was somewhat similar to the use made of lot 80 by the defendant in this case. In the course of the opinion the court summarized and commented on the evidence as follows:

"It was testified on behalf of the defendants that some time in the latter part of the same year, 1865, one Richard Rothwell, a stonecutter and builder, who owned and occupied an adjoining lot, deposited upon the rear of the lot in controversy some pontoons, which he had purchased from the United States, and which he stored there until he could make some disposition of them; and that he afterwards used a part of this lot for the deposit of stone and marble which he used in his business. He testified that he had deposited three or four wagon-loads of marble there as early as the year 1867, and that some of the pontoons remained in the lot four or five years. He also testified that, in the year 1870, he commenced to deposit stone there in large quantities; and that in 1872 he erected a small shed on the lot in which to carry on his work, and which he replaced with a larger structure in or about the year 1882. . . . Although there was no fence around this lot during the period in question, yet it was occupied by the tenant for the purpose of his business, that of marble and stone cutting; and although every foot of the property was not covered by his material, yet it was placed upon the lot in a convenient manner to be used by him in the prosecution of his business, and in a manner which showed that his possession was not in connection with any others, but was exclusive and perfect in himself. . . . We agree with the court

below when, through Mr. Justice Morris, it says that: 'Short of an actual enclosure, it is not easy to conceive of a use and occupation more sharply distinctive and adverse than the conversion of the property into a stoneyard, with the stone practically scattered all over it, according to the testimony of one or more of the witnesses.'

Moreover we think the facts in the case at bar clearly bring it within the doctrine announced by this court in the case of *Pioneer Investment & T. Co. v. Board of Education* (recently decided by this court), 35 Utah, 1, 99 Pac. 150. In that case the question of adverse possession was involved and Mrs. Justice Frick, speaking for the court, in the course of the opinion, says:

"It is not the mere possession that determines the rights of the parties, but it is the character of the possession that controls. But how is the character of the possession to be determined? It cannot always be determined from the declarations of the party in possession, because he may not make any, nor are his declarations always conclusive as against one claiming under him. Whenever the possession is of such a character that ownership may be inferred therefrom, then the possession ordinarily may be presumed to be hostile to the rights of the true owner; that is, if a party places permanent structures upon the land belonging to another, and uses the land and structures the same as an owner ordinarily uses his land, then in the absence of something showing a contrary intention, a claim of ownership may be inferred in favor of the party in possession."

Attention is also invited to the case of *Toltec Ranch Co. v. Babcock*, 24 Utah, 183, 66 Pac. 876, wherein this court, speaking through Mr. Justice Bartch, says:

Claim. "The land was occupied and used the same as other lands were in that neighborhood. The possession, as appears from the evidence, was open, notorious, uninterrupted, and peaceable, and under a claim of right. It must, therefore, necessarily be deemed to have been adverse to the holder of the legal title, and such long-continued possession may be deemed to have been adverse, though not in character hostile. 'Where one is shown to have been in possession of land for the period of limitation, apparently as owner, and such possession is not explained or otherwise accounted for, it will be presumed to have been adverse.' (1 Am. and Eng. Enc. Law [2d Ed.], 889, 890; 3 Washb. Real Prop. [4th Ed.], 159, par. 43.)"

As we have observed, lot 80 was used by appellant as a yard in connection with his blacksmith establishment. And

the evidence shows that he permitted teamsters, peddlers, and others who had occasion to do so, to use it as a camp ground when such usage did not interfere with his own use and occupation of the lot. Under these circumstances the occasional driving over the ground used 5 as a yard by respondent in going to and coming from its barn was in no sense an interference with appellant's possession.

We now come to what we deem to be the most difficult question presented by the appeal, namely: Does the evidence show that appellant had color of title to the premises during his occupancy of the same? Appellant testified that in the fall of 1879 he received a quitclaim deed to the property from James Campbell, through H. Campbell, who, the record shows, was at the time the agent and attorney in fact for James Campbell, with full power to sell and dispose of his real estate, and to execute and acknowledge deeds for the same for him and in his name; that the consideration mentioned in the deed was fifty-five dollars the amount that he paid Campbell for the land; that he saw H. Campbell sign the deed and duly acknowledge it before a notary public; that the notary public signed the same and put his seal thereon; that it was attested by two witnesses; that he failed to have the deed recorded, and that it was destroyed in the fire that burned down his blacksmith shop in 1895; that the notary public before whom the deed was acknowledged by H. Campbell and one of the subscribing witnesses (giving the name of each) are dead; that he read the deed at the time it was delivered to him by H. Campbell, and that it was in the usual form, "in what they called the legal form in those days."

He further testified that he could not give the exact language of the deed, but did recollect that in substance it read: "James Campbell, first party, by Hughey Campbell attorney in fact . . . to R. D. McDonald, quitclaim deed for certain ground from a certain point to the southeast corner, then running southwesterly to a point (referring to map, "Exhibit G"), then running westerly to the mountain—

going on to the livery ground on the north, then back to point of beginning. . . . At the time there were posts there to which this instrument referred. One at what is shown on Plat "G" as southeast corner of lot 8 (Lot 81) . . . and the southeast corner of Lot 80 of Smith's survey on Carr's Park road, and there was a post at the corner at the junction of Main Bingham Canyon and Carr's Fork road. The deed referred to these posts and said the land went back to the mountain westerly, and it said the ground was twenty-five feet wide." On cross-examination the witness stated that he did not remember the language of the calls of his deed, but he did insist that "it (the deed) was the same language used them days by (in) quitclaim deeds. Cannot give the language of the description, only mentioning about them posts and running west so many feet. He (Campbell) showed me the lines. All that I remember is it was the usual form them days, the names of the parties, the description of the property, and they showed me the boundaries, and the posts were there. Q. You cannot give us either in words or substance the description as it appeared on that paper, can you? A. Not exactly; I could not." Other witnesses who were familiar with the premises in 1887 and for many years thereafter, testified to the existence of the posts referred to by appellant in his testimony as being mentioned in the deed.

Counsel for respondent insist that this evidence was insufficient to prove the contents of the deed, and that, therefore, appellant wholly failed to show that he held possession and occupied the property in question under claim of title founded upon a written instrument as required by the provisions of the statute hereinbefore mentioned. The trial court evidently took the same view. In this we think the court erred. To hold that the evidence in this case was sufficient to prove the contents of the deed, which, 6 as we have stated, was made and executed nearly thirty years before the evidence was offered would, in most cases, exclude secondary proof of the contents of a lost deed. This same question was before the Supreme Court of Illinois

in the case of *Perry v. Burton*, 111 Ill. 138, and that court, in the course of a well-considered opinion, said:

"A witness testifying to the contents of a lost deed is not expected to be able to repeat it verbatim from memory. Indeed, if he were to do so, that circumstance would, in itself, be so suspicious as to call for an explanation. All that parties, in such cases, can be expected to remember, is *that they made a deed, to whom and about what time, for what consideration, whether warranty or quit claim and for what property*. To require more would, in most instances, practically amount to an exclusion of oral evidence in the case of a lost or destroyed deed." (*Italics ours.*)

See also, *Parks v. Caudle*, 58 Tex. 216; *Eming v. Diehl*, 76 Pa. 374; *Scott v. Crouch*, 24 Utah, 377, 67 Pac. 2068.

The judgment is reversed with directions to the trial court to set aside its findings of fact heretofore made and filed in the cause, and to make findings in favor of appellant (defendant), and to enter a decree thereon, in accordance with the views herein expressed. Costs to appellant.

STRAUP, O. J., and FRICK, J., concur.

CROMEENES v. SAN PEDRO, LOS ANGELES &
SALT LAKE RAILROAD COMPANY.

No. 2044. Decided May 4, 1910 (109 Pac. 10).

1. RAILROADS—KILLING BOY ON STREET—EVIDENCE OF NEGLIGENCE. In an action for death of a boy killed by a train running along a street, evidence held to support a finding that it was operated in a negligent manner. (Page 484.)
2. RAILROADS—CARE IN RUNNING TRAIN—RIGHT TO PRESUME—DUTY OF PEDESTRIAN—USE OF DUE CARE. A pedestrian may act on the assumption that a railroad company will use ordinary care in running its train across public streets and along thoroughfares of thickly populated districts of a city; but this does not relieve him of the duty imposed to use due care for his own safety. (Page 485.)
3. RAILROADS—USE OF STREETS—DUTIES OF PERSONS AND RAILROAD COMPANIES. Rights and duties of persons and railroad companies in the use of streets are reciprocal.¹ (Page 485.)

¹ *Spiking v. Con. Ry. & P. Co.*, 33 Utah, 313, 93 Pac. 838.

4. **RAILROADS—KILLING BOY ON STREET—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.** In an action for death of a boy killed by a train running along a street, his contributory negligence *held* under the evidence to be for the jury. (Page 485.)
5. **TRIAL—INSTRUCTIONS—CONSTRUCTION OF CHARGE AS A WHOLE.** All instructions must be considered together, and if, as a whole, they correctly state the law applicable to issues, it is not error that the law applicable to different questions involved is separately stated. (Page 487.)
6. **TRIAL—INSTRUCTIONS—CONSTRUCTION OF CHARGE AS A WHOLE.** In an action for death of a boy killed by a train running along a street, the court charged that if the speed of the engine immediately before the accident was unusual and greater than ordinary prudence would dictate in view of the neighborhood and dangers likely to be encountered, and the engineer before striking him saw the boy in a position where, as a man of ordinary prudence, skilled in the business, he ought to have appreciated that he was in danger, and would have been able to stop if going at a speed dictated by ordinary prudence, but could not do so because he was then running at a negligent speed, the boy's death was caused by his negligence. It was contended that this disregarded the defense of contributory negligence; but in another part of its charge the court, after defining "ordinary care," and instructing in general terms what constituted contributory negligence, charged that, if deceased was negligent within this definition, plaintiff could not recover, though defendant may also have been negligent, and that it was the duty of deceased to use all reasonable care as therebefore defined to avoid injury. The court further charged that, unless the jury found from a preponderance of the evidence that defendant was negligent, plaintiff could not recover, or if they found that defendant was negligent, but that deceased was also guilty of negligence contributing directly to his death, plaintiff could not recover, and that if they believed deceased stepped on the track in front of the approaching train without looking or taking any precaution, reasonably to be expected from a boy of his age, experience, and discretion, to learn the approach of a train, when but to look or otherwise use ordinary care would have disclosed to him the train's approach, he was guilty of contributory negligence which barred recovery, and verdict should be for defendant. *Held* that, while the court did not charge on contributory negligence in the instruction complained of, the other instructions carefully guarded defendant's rights so far as involved in that issue, and, read together, the instructions were sufficient. (Page 487.)
7. **APPEAL AND ERROR—OBJECTIONS FOR REVIEW—ADMISSION OF EVIDENCE.** Objections having been properly made and exceptions taken to a certain line of testimony, the objecting party, to save the ques-

tion for review, need not object to each question thereafter asked the witness concerning the same matter. (Page 488.)

8. **TRIAL—RECEPTION OF EVIDENCE—OBJECTING TO TESTIMONY.** Where a question asked of a witness does not indicate that the testimony sought is objectionable, it is not error to overrule objections thereto, and, if the answer contains objectionable testimony, the remedy is to move to strike it out. (Page 489.)
9. **APPEAL AND ERROR—PRESENTATION OF GROUNDS OF REVIEW—OBJECTION TO TESTIMONY—NECESSITY OF MOTION TO STRIKE.** Where, at the time of overruling objection to a question not indicating that testimony sought is objectionable, the court knows what the witness will answer, and then overrules the objection, it must be held that the testimony was admitted advisedly, and a motion to strike it out is unnecessary to present the objection thereto for review. (Page 489.)
10. **EVIDENCE—RES GESTAE—STATEMENT CONNECTED WITH TRANSACTION.** In an action for death of a boy killed by a train running along a street, there was evidence that a witness to the accident, who got off the train just before the boy was struck, stated that he walked the length of "a car or two" to where the engineer was standing and said to him: "You have done a damn fine job. Why didn't you stop before you ran over him?" *Held*, that the court did not err in admitting as *res gestae* what the witness said. (Page 490.)
11. **EVIDENCE—DECLARATIONS AS "RES GESTAE."** The test whether declarations are *res gestae* is: Were they the facts talking through the party, or the party talking about the facts? Instinctiveness is the requisite, and when this exists the declarations are admissible. (Page 490.)
12. **APPEAL AND ERROR—HARMLESS ERROR—REMARKS OF COUNSEL.** Prejudicial error cannot be predicated on remarks of counsel as to a witness against the complaining party, tending to minimize the effect of the witness' evidence, which from beginning to end was favorable to his adversary. (Page 496.)

McCARTY, J., dissenting in part.

Appeal from District Court, Third District; *Hon. M. L. Ritchie*, Judge.

Action by J. W. Cromeenes against the San Pedro, Los Angeles & Salt Lake Railroad Company.

Judgment for plaintiff. Defendant appeals.

AFFIRMED.

Pennel Cherrington for appellant.

Powers & Marionaux and *J. W. McKinney* for respondent.

APPELLANT'S POINTS.

The appellant's claim is that all the rulings of the trial court on the question of contributory negligence were wrong, for the reason that the deceased should have been held guilty of contributory negligence as a matter of law. (*Gesas v. O. S. L. R. R. Co.*, 33 Utah, 156, 93 Pac. 274; *Cleveland, etc., R. R. Co. v. Taritt*, 64 Fed. Rep. 831; *Krenzer v. Pittsburg, etc., R. R.*, 68 Amer. State Reps. 252; *Wendell v. N. Y. Central, etc., R. R. Co.*, 91 N. Y. 420; *C. B. & Q. v. Laughlin*, 87 Pac. Rep. 749; *Gehring v. Atlantic City Ry.*, 14 L. R. A. [N. S.] 312; *Reynolds v. N. Y. Central, etc., R. R. Co.*, 58 N. Y. 248; *Tucker v. N. Y. Central, etc., R. R. Co.*, 21 Amer. St. Rep. 670; *Ecliff v. W. St. L. & P. R. R. Co.*, 64 Mich. 196; *Masser v. C., R. I. & P. R. C. Co.*, 68 Iowa 602.) It would seem that the question asked by McHugh and the alleged silence of the engineer were admitted in evidence as a part of the *res gestae*. We have seen no text book or court decision giving a definition of *res gestae* that this evidence will fit. The question was asked subsequent to the killing of the boy; it did not elucidate that act in any way; did not explain it; did not describe it; did not qualify it; was no part of the act, nor was the act a part of it—it was merely the expression of the opinion of McHugh concerning the accident, expressed after the accident had happened, and was incompetent and immaterial as original testimony, since certainly the witness McHugh on the stand would not have been allowed to say that the engineer "did a damn fine job." The trial court knew that it was only an opinion, though it admitted the evidence. (Enc. of Evidence, 342; 16 Cyc., par. 2, p. 1148; *Kuperschmidt v. Metropolitan St. Ry. Co.*, 94 N. Y. Supp. 17; *Indianapolis St. Ry. Co. v. Whitaker*, 160 Ind. 125; *Indianapolis St. Ry. Co. v. Taylor*, 164 Ind. 155; *Leach v. O. S.*

L. R. R. Co., 29 Utah, 285; 2 Jones on Evidence, sec. 361; Am. and Eng. Ency. of Law, 666, 94 Ala. 9; *Butler v. M. R. Co.*, 143 N. Y. 417; *Luby v. H. R. Co.*, 17 N. Y. 131; *Ganaway v. Salt Lake Dramatic Association*, 17 Utah, 37; *Missouri Pac. Ry. v. Ivy*, 9 S. W. 346 [Tex. Supreme Court]; *Dwyer v. Continental Insurance Co.*, 63 Tex. 354; *Goso v. Southern Ry. Co.*, 45 S. E. 810; *Welkins v. Farrell*, 30 S. W. 450 [Texas Civil Appeals]; *Blackman v. West Jersey, etc.*, 52 Atlantic, 370; *Citizen's Street Railway Co. v. Howard*, 52 S. W. 865; *Redmond v. Métrop. Street Railway Co.*, 84 S. W. 26; *Norris v. Interurban Street Railway Co.*, 90 N. Y. Supp. 460; *Dompier v. Lewis*, 91 N. W. 152; *Butler v. Railway Co.*, 143 N. Y. 417; *Chicago Street Railway v. White*, 110 Ill. App. 23; *Koenig v. Union Depot*, 73 S. W. 637; *Silveira v. Iverson*, 60 Pac. 687; *Lane v. Bryant*, 9 Gray, 245; *State v. Ramsey*, 48 La. Ann. 1407; *Travelers' Insurance Co. v. Shepard*, 85 Ga. 751; *Richmond & D. R. Co. v. Hammond*, 93 Ala. 181; *Hughes v. L. & N. R. Co.*, 104 Ky. 774; *Carr v. State*, 76 Ga. 592; *Beck v. State*, 76 Ga. 452; *Scott v. St. Louis, etc., Ry. Co.*, 112; Iowa, 54; *Dunn v. C., R. I. & P. Ry. Co.*, 130 Iowa, 580.)

RESPONDENT'S POINTS.

With respect to a street railroad, the mere fact that a person attempts to cross it when a car is seen to be approaching does not of itself constitute negligence, . . . ordinarily, whether or not he was negligent in attempting to cross, under the circumstances of the case, is a question for the jury. (*Spiking v. Con. Ry. & P. Co.*, 33 Utah, 313, 93 Pac., pp. 840-841.) The boy had the right to assume that the cars would be run with ordinary care on the public street. (*Fult v. Wyckoff*, 25 Ind. 321; *Parrott v. Barney*, Fed. cases, No. 10773, 82 U. S. [15 Wallace], 524; *Newson v. N. Y. Cent. R. R.*, 26 N. Y. 383; *Snyder v. Pittsburgh, etc., Ry. Co.*, 11 W. Va. 14.) It has become a settled rule of law in this state that the child is not negligent if he exercised that degree of care which under like circumstances

would be expected of one of his years and capacity. And whether he uses such care in any given case is a question to be left for the jury to decide. (*Anderson v. R. R.*, 81 Mo. App. 116; *Riley v. Railroad*, 68 Mo. App. 652; *Burger v. R. R.*, 112 Mo. 249, 20 S. W. 439, 34 Am. St. Rep. 379; *Anderson v. R. R.*, 161 Mo. 1411, 61 S. W. 874.)

McCARTY, J.

This action was brought to recover damages for the death of plaintiff's son, who was run over and killed by a train of the defendant on Third West Street, in Salt Lake City, Utah, on May 22, 1907. The negligence alleged by plaintiff consisted in the failure of defendant to ring the bell on its locomotive in accordance with an ordinance of the city then in existence; to give any warning of the approach of the locomotive, which was being run at a high and dangerous rate of speed; and to keep a sufficient lookout for pedestrians. Defendant, in its answer, denied all the acts of negligence set out in the complaint, and further alleged that that the death of the deceased was due to his own negligence in suddenly and unexpectedly stepping upon the railroad track of the defendant immediately in front of the engine by which he was killed, and so close thereto that the defendant's employees thereon had no opportunity to stop the same before striking him, although the deceased, had he looked for the approaching train, had a clear and unobstructed view thereof. The case was tried to a jury, who returned a verdict for plaintiff and assessed his damages at \$4000. To reverse the judgment rendered on the verdict, defendant prosecutes this appeal.

The accident complained of occurred on Third West Street a short distance south of the intersection of said street with Sixth South Street, in Salt Lake City. It is admitted that "both sides of the street, in the vicinity of the accident, were thickly populated with adults and children." At the time of the accident, which was about five o'clock in the afternoon, two freight trains were being operated on Third West Street. One, an Oregon Short Line train, was being

run north on the west track, and the other train consisting of an engine and caboose, which belonged to the defendant, was being run south on the east track; there being two parallel tracks on said street. The distance between the tracks was about eight feet. Plaintiff and his family, including the deceased, were living and for a period of about eighteen or twenty months prior to the accident had lived, on the west side of Third West Street, near where the accident occurred, during which time several regular trains passed daily over the railroad tracks mentioned. Shortly before the accident, the deceased, who was a bright, intelligent boy, twelve years of age, left his home and went over to a grocery store on the east side of the street. As he was returning to his home, the Oregon Short Line train came up from the south on the west track and he stopped in the street east of the west track and about ninety or one hundred feet south of the south line of Sixth South Street watching the train from the south and evidently waiting for it to pass. While the deceased was thus standing and waiting for the Oregon Short Line train to pass on to the north, he was struck by defendant's train, which was coming from the north on the east track. There is a conflict in the evidence as to the exact location of the deceased with reference to the railroad tracks when he was struck by defendant's engine.

The only witness who saw the deceased struck was George McHugh, a switchman for the Oregon Short Line company, who, at the time of the accident, was on the train going north, which train consisted of an engine and fifteen freight cars. McHugh was on the third car from the rear of the train. When this car was at Seventh South Street, McHugh saw the other train coming south on the east track, and he testified that he saw the boy at about the same time as he did the train; that the boy was crossing the street to the west; that when he got between the two tracks he stopped near the west rail of the east track; that on observing the boy he began signaling with his hands to the operatives of the train coming from the north on the east track;

that he also tried to attract the attention of the boy at the same time; that it seemed that he "attracted the attention of the men on the train from the north as they slowed up; they came pretty near to a standstill, but they hit the boy;" that after striking the boy the train passed on until the rear end thereof was opposite or near where the boy was lying after being killed. Counsel for appellant have, in their brief, invited attention to some expressions in the testimony of this witness, which, standing alone, would seem to indicate that the deceased was standing between the rails of the east track when he was struck by the train. By an examination of the testimony of the witness, as the same appears in the bill of exceptions, it will be seen that his attention, while testifying, was called to some kind of a diagram or map that was sketched or drawn on a blackboard representing the street and railroad track at the point and in the vicinity of where the accident happened, and at times he became very much confused and did not seem to understand which direction was east and which was west on the map. The apparent discrepancy in his testimony as to where the deceased was standing when struck by the engine, we think, was due to the inability of the witness to understand the map or sketch of the premises as it appeared on the blackboard. In his direct examination he testified, in part, as follows: "Q. Now, will you tell the jury about where the boy was standing at that time? A. Standing on the west side of the east track. . . . Q. And between the two tracks? A. Yes, sir." On cross-examination he stated repeatedly that the deceased, when struck by the engine, was standing west of the east track.

Plaintiff also introduced testimony from which it could be fairly inferred that the operatives of the defendant's train saw the deceased when the engine was about the center of Sixth South Street, which, according to the undisputed evidence, is from 150 to 160 feet north from the point where the accident occurred.

The testimony of the engineer and fireman, who were operating defendant's train at the time of the accident, tended

to show that the deceased was standing between the rails of the east track, and that the train was going at the rate of about eleven or twelve miles an hour. The fireman testified that he first saw the deceased as the engine was crossing the south line of Sixth South Street; that the deceased was crossing the street walking west; and that he stepped upon the track when the engine was within about thirty feet of him. The engineer testified on this point, in part, as follows: "As we crossed Sixth South Street, I was looking ahead of the engine. . . . Just after we got over the south side of Sixth South Street crossing, the fireman said, 'Look out!' I was looking out and didn't see anything, so I looked over at him to see what he meant. . . . Then I looked back at the tracks, and this is when I saw the boy step over the rail. . . . I applied the air and blew the whistle. . . . I put the air into emergency. That means setting the air brakes to the full capacity. . . . He was then between thirty and forty feet ahead of the engine. . . . I didn't see the boy at all before he got on the tracks. He was just stepping over the rail as I saw him. I know he hadn't been on there before because I had been looking ahead. I didn't see him until I was south of Sixth South Street." The engineer and fireman of defendant's train also testified that as the train approached Sixth South Street the whistle was blown, and that the bell was rung continuously until after the deceased was struck. On the other hand, one of plaintiff's witnesses testified that the train, as it crossed Sixth South Street, was running at the rate of eighteen or twenty miles an hour. Two other of his witnesses testified that it was going from twenty-five to thirty miles an hour. And the testimony of practically all of his witnesses tended to show that the bell was not rung prior to the time the deceased was struck by the engine.

It was stipulated that at the time of the accident an ordinance of Salt Lake City was in force which provided that: "It shall be unlawful for any person employed on a locomotive to fail to continuously ring the bell of such locomotive while in motion in the inhabited portions of the city." It

was further stipulated that, by virtue of a franchise from the city, the defendant had a lawful right to run its trains on Third West Street and along both of said tracks.

As is usual in this class of cases, there is a sharp conflict in the evidence on the material issues in the case. We are of the opinion that there is ample evidence to support a finding that defendant's train was, on the 1 occasion in question, operated in a careless and negligent manner; and, while counsel for the railroad company do not admit that the company was guilty of negligence, yet they do not claim that there is not sufficient evidence to support a finding to that effect. Therefore we will not refer further to that issue of the case.

Appellant's first assignment of error relates to the refusal of the court to direct a verdict in its favor. It is contended that the undisputed evidence in the case shows that the deceased was, as a matter of law, guilty of contributory negligence. We think this contention is untenable. The accident occurred on one of the public streets of the city where the deceased had as much right to be as appellant had to run its cars, with the exception that when they were both upon the street at the same time appellant had the prior right of passage. When the deceased was first seen by the witness McHugh, he was in the act of crossing the street going in the direction of his home. At this time McHugh was at Seventh South Street, and, as we have heretofore observed, he was on the third car from the rear of the train; there being fifteen cars in the train. It necessarily follows that the head of the train was some distance north of Seventh South Street when the boy was first observed by McHugh, and we think it may be fairly inferred from these facts, when considered in connection with the evidence of McHugh wherein he says: "I said I didn't see where he came from, but he was walking in there and was standing there as our train passed by going north, looking right at our train as it passed by him. . . . He couldn't go any farther on account of our train"—that the head of the train going north was near to, if not directly in front of, the

deceased when he stepped between the two tracks evidently waiting for it to pass on to the north so that he could continue on his way home. Now, if defendant's train was traveling at the rate of twenty-five or thirty miles an hour—and there is abundant evidence in the record to support a finding to that effect—we think it may be fairly inferred that the train was a considerable distance north of Sixth South Street when the deceased started to cross the street in the direction of his home. And there is sufficient evidence to support a finding that the train could have been stopped in time to have avoided the accident if it had not been going at an unreasonable and dangerous rate of speed, and the engineer and fireman had kept a proper lookout ahead as they approached and crossed Sixth South Street. The deceased had a right to assume, and to act on the assumption, that defendant would use ordinary care 2, 3 in running its train across the public streets and along the thoroughfares of the thickly populated districts of the city. This, however, did not relieve him of the duty which the law imposes on people, generally who have occasion to go upon or to cross railroad tracks, to use due care for their own safety. As was said in the case of *Spiking v. Con. Ry. & P. Co.*, 33 Utah, 313, 93 Pac. 838, the rights and duties of persons and railroad companies in the use of streets are mutual and reciprocal. As to whether the deceased used the same degree of care and caution in entering upon and crossing defendant's railroad track that would be expected generally of persons of his age, intelligence, and experience, under the same or similar circumstances, we think was a question of fact for the jury to deter- 4 mine. To hold, in the face of the evidence in this case, which, for the purposes of this appeal, must be viewed and considered in the light most favorable to respondent, that the deceased was, as a matter of law, guilty of contributory negligence, would tend to establish a rule, the effect of which would be to cast the whole duty upon the people, who have occasion to go upon the public streets which are in part occupied by railroad companies in the maintenance of

tracks and the moving of trains, of avoiding collisions and injuries. And, furthermore, to so hold would, to a large extent, deprive the public of the protection which the law, by imposing on railroad companies the duty to use ordinary care in moving their trains across public streets and along the thoroughfares of thickly populated districts of our towns and cities, is designed to give. This we have no disposition to do.

The court, among other things, charged the jury as follows: "You are further instructed that if you believe from the evidence that the speed at which the engine in question was being run immediately before the accident was unusual and greater than ordinary prudence would have dictated in view of the neighborhood and of the dangers likely to be encountered, and that the engineer saw the boy, before striking him, in a position where he (the engineer) ought, as a man of ordinary prudence, skilled in the business to have appreciated that the boy was in danger, and would have been able to stop the engine had it been going at a speed dictated by ordinary prudence, but could not stop because he was running the engine, when he saw the boy's peril, at a speed which was negligent, then the death of the boy was caused by the negligence of the engineer."

The giving of this instruction is assigned as error. It is contended that the court, by giving this instruction, "entirely disregarded the defense of contributory negligence." The court, in another part of its charge, after defining the term "ordinary care," and instructing the jury in general terms as to what constituted contributory negligence, charged the jury as follows: "If the jury finds from the evidence that the deceased, Charles Raymond Cromeenes, was careless and negligent within this definition, the plaintiff cannot recover even though the defendant may also have been negligent. It was the duty of the deceased to be careful and to use all reasonable care, as hereinbefore defined, to avoid injury to himself." The court further charged the jury that, "unless you find from a preponderance of the evidence that the defendant was negligent, the plaintiff cannot re-

cover; or, if you find from the evidence that the defendant was negligent, but that the deceased was also guilty of negligence which contributed directly to his death, then the plaintiff cannot recover." The court also instructed the jury as follows: "The court instructs you that if you believe from the evidence that the deceased stepped upon the track in front of the approaching train without looking or taking any precaution such as would reasonably be expected from a boy of his age, experience, and discretion, to learn of the approach of an on-coming train, when but to look or otherwise use ordinary care would have disclosed to him the train's approach, he was guilty of contributory negligence which bars a recovery for his death, and your verdict should be for the defendant." It will thus be observed that the court, while it did not charge the jury on the question of contributory negligence in the instruction complained of, nevertheless did give other instructions in which it carefully guarded the rights of the defendant, so far as they were involved in that issue. It is a familiar rule of law that all the instructions must be read and considered together, and if, as a whole, they contain a correct 5, 6 statement of the law applicable to the issues in a case, the court cannot be convicted of error because the law applicable to the different questions involved is separately stated. In such case the instructions supplement each other, and if, when read and considered as a series they contain a correct statement of the law, it is sufficient.

Appellant's next assignment of error relates to the admission in evidence of a statement made by the witness McHugh to the engineer on defendant's train immediately after the accident occurred. McHugh testified that the train he was on stopped a little before the deceased was struck; that he got off the train and walked the length of "a car or two" to where the engineer was standing. Plaintiff's counsel then asked the witness the following question: "What did you say to the engineer?" Counsel for defendant objected to the question on the ground that it was incompetent and immaterial. In response to the objection, the court said:

"The question is whether it is a part of the *res gestae*. Prima facie it would seem that it was. There is no statement from the witness as to how long a time elapsed. It seems it must have been very soon afterwards." The witness was then further interrogated respecting the length of time between the happening of the accident and when he spoke to the engineer, and, after substantially repeating the testimony that he had already given on this point, he was asked the following question: "What did you say to the engineer, and what did he say to you?" Counsel for defendant objected to this question as follows: "I renew the objection. It is immaterial and irrelevant, and not part of the *res gestae*. It is not connected with the thing at all." Counsel for plaintiff then stated to the court: "I have shown the court what the answer was in the other trial." The court replied: "The question, in the mind of the court, is, it seems to have been simply an opinion." In response to the remarks of the court, counsel for respondent said: "The important thing is what the engineer failed to say. It was up to him." The objection was overruled, to which ruling appellant duly excepted. Counsel for respondent then renewed the examination of the witness as follows: "Q. What did you say to him? A. I says: 'You have done a damn fine job. Why didn't you stop before you ran over him?' Q. What did he say to that? A. I didn't hear him say anything."

No further questions were asked the witness on this point. Nor did appellant renew its objection to this line of testimony. Nor did it move to strike out the testimony elicited by the last two questions. Respondent now contends that, as appellant did not interpose an objection to the last two questions, nor move the court to strike out the answers made thereto, no exception was properly saved to the admission of this testimony, and hence there is nothing for the court to review under this assignment of error. Objections having been properly made and exceptions taken to this line of testimony, appellant was not required, in order to save the question for review, to object to each question thereafter asked the witness concerning the same

matter covered by the objections already made. (Spelling New Tr. & App. Pro., sec. 296; 8 Ency. Pl. & Pr. 229; *Magee v. North Pac. C. R. Co.*, 78 Cal. 430, 21 Pac. 114, 12 Am. St. Rep. 69; Jones on Ev., sec. 897; *Gilpin v. Gilpin*, 12 Colo. 504, 21 Pac. 616.)

Respondent further contends that the question did not necessarily call for inadmissible testimony, and that therefore appellant should, if he desired to save an exception to the admission of the testimony given in answers to the questions, have moved the court to strike it out, and, not having done so, the question is not properly before this court for review. The general rule seems to be that where a witness is asked a question, and the question itself does not indicate that the testimony sought to be elicited thereby is incompetent, or otherwise objectionable, it is not

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error for the court to overrule the objections made thereto. If the answer contains testimony that is objectionable the remedy of the party objecting is to move the court to strike out that which is improper. The reason for the rule undoubtedly is that the court, in such case, has no means of determining, before the question is answered, whether the testimony sought to be elicited is or is not admissible. But this is not that kind of a case. It appears from the record that some time prior to the trial of this case there had been another trial in which the death of the deceased was an issue, and that McHugh was called as a witness and testified in that case. And before the ruling here complained of was made, the court's attention was called to an answer made by McHugh to the same, or a similar, question propounded to him "in the other trial." And, furthermore, counsel for respondent, at the time the objection was made, stated to the court that the "important thing" he expected to show by this testimony was "what the engineer failed to say." It therefore appears that both court and counsel were fully advised, before the court ruled on ap-
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pellant's objection, as to the character of the testimony the witness would give if permitted to answer the question. The court having admitted the testimony advisedly,

no motion to strike out was necessary. Under the circumstances, the situation is the same as though the respondent had offered, at the time the objection was made, to prove the very thing complained of, and the court had permitted him to do so over appellant's objection.

This brings us to the more important question presented by this appeal, namely, did the court err in admitting evidence of the statement made by McHugh to the engineer immediately after the accident occurred? My associates are of the opinion that what McHugh said to the engineer on that occasion was admissible in evidence as a part 10 of the *res gestae*, and that the court did not err in so holding. I take an entirely different view of the question, and am of the opinion that the ruling of the court, under the great weight of authority, cannot be upheld on that ground. In view of the importance of the principle involved in the ruling complained of, and the bearing such ruling may have upon cases involving the same question that may hereafter come before the courts of this state, I have decided to briefly discuss this phase of the case. To bring the declarations of a party within the doctrine of *res gestae*, they must be connected with, and grow out of, the act or transaction which is the subject-matter of inquiry so as to form one continuous transaction, and must, in some way, elucidate, qualify, or characterize the act, and, in a legal sense, be a part of it. (*Leach v. Railroad*, 29 Utah, 285, 81 Pac. 90, 110 Am. St. Rep. 708.) "The test of whether or not declarations are *res gestae* is: Where the facts talking through the party, or the party's talk about the facts? 11 Instinctiveness is the requisite, and when this exists the declarations are admissible." (7 Words and Phrases, 6136.) Upon this proposition the authorities all agree. There is, however, a conflict in the authorities as to whether declarations made by a mere bystander or onlooker are admissible as a part of the *res gestae*; all other conditions necessary to make them admissible as such being present. But I think the weight of authority is to the effect that the party, making the declaration must in some way be an actor or par-

ticipant in the transaction or event to which his declaration relates. "The comments and criticism of mere bystanders cannot be proved." (Gillett on Ind. & Collat. Evi. 290; 24 A. and E. Ency. L. (2 Ed.) 681, 686; 7 Words and Phrases, 6131; Underhill on Crim. Evi. 125, 126; *Ganaway v. Salt Lake Dramatic Ass'n*, 17 Utah, 37, 53 Pac. 830; *Indianapolis St. Ry. Co. v. Taylor*, 164 Ind. 155, 72 N. E. 1045; *Kuperschmidt v. Met. St. Ry. Co.*, 47 Misc. Rep. 352, 94 N. Y. Supp. 17; *Louisville Packet Co. v. Samuels' Adm'x* [Ky.] 59 S. W. 3; *Kaelin v. Commonwealth*, 84 Ky. 354, 1 S. W. 594; *Senn v. Southern Ry Co.*, 108 Mo. 142, 18 S. W. 1007; *Flynn v. State*, 43 Ark. 293; *Dixon v. Northern Pac. Ry. Co.*, 37 Wash. 310, 79 Pac. 943, 68 L. R. A. 895, 107 Am. St. Rep. 810; *Wilkins v. Ferrell*, 10 Tex. Civ. App. 231, 30 S. W. 450; *Leahey v. Cass Ave. & F. G. Ry. Co.*, 97 Mo. 173, 10 S. W. 895, 10 Am. St. Rep. 298; *Ehrhard v. Met. St. Ry. Co.*, 69 App. Div. 124, 74 N. Y. Supp. 551; *Chicago City Ry. Co. v. White*, 110 Ill. App. 23; *Gosa v. Southern Ry.*, 67 S. C. 347, 45 S. E. 810; *Railroad Co. v. Le Gierse*, 51 Tex. 189; *Dwyer v. Continental Ins. Co.*, 63 Tex. 354; *Louisville R. R. Co. v. Johnson* [Ky.] 115 S. W. 207, 20 L. R. A. [N. S.] 133.)

I do not wish to be understood as holding that the party making a declaration must necessarily be a victim of the transaction, or have some responsibility connected therewith, or personal or special interest therein, to be an actor or participant in such transaction. A bystander may, during the happening of an act or event, become an actor or participant therein. If on such occasion he makes a declaration that has a bearing or influence upon one or more of the events leading up to and surrounding the principal transaction, and such declaration tends to explain, elucidate, or characterize the act or transaction under investigation, it is generally admissible as a part of the *res gestae*. (11 Ency. Ev. 338, and cases cited in note; Gillett on Ind. and Collat. Ev. 290; *Baker v. Gausin*, 76 Ind. 321; *Morton v. State*, 91 Tenn. 437, 19 S. W. 225; *Gillam v. Sigman*, 29 Cal. 638; *Kleiber v. People's Ry. Co.*, 107 Mo. 240, 17 S. W. 946, 14 L. R. A. 613; *Rail-*

way Co. v. Murray, 55 Ark. 248, 18 S. W. 50, 16 L. R. A. 787, 29 Am. St. Rep. 32; State v. Kaiser, 124 Mo. 651, 28 S. W. 182.) I also invite attention to an elaborate discussion of this question found in a note to *Louisville v. Johnson*, *supra*, reported in 20 L. R. A. [N. S.] 133, where many cases are cited and discussed.)

Tested by the foregoing rules, I think the statement made by McHugh to the engineer was clearly inadmissible. He did no act which contributed to the unfortunate occurrence, and was in no way connected with the happening of it except as a mere observer or spectator. Nor did the statement made by him to the engineer tend to explain or illustrate any fact or circumstance leading up to or in any way connected with the accident. True, he testified that, when he saw defendant's train approaching from the north and realized the danger the deceased was in because of the approaching train, he made signals with his hands and arms and endeavored to attract the attention of the engineer and fireman on the train as well as that of deceased. What he did prior to the accident in endeavoring to attract the attention of the engineer and fireman to the perilous situation of the boy was admissible in evidence as tending to show negligence on the part of the parties in not keeping a proper lookout ahead of their train as it proceeded along this public and much used thoroughfare. But what McHugh said to the engineer after the boy was killed was, at most, only his opinion or conclusion respecting a past transaction, and in no way tended to explain, qualify, or illustrate any act or omission of either of the operatives of the train, or of the boy. The first part of the declaration was nothing more than a criticism of what had been done, and the latter part of it a mere inquiry in regard to a material fact in the case. Therefore, under all the authorities as I read them, the statement was inadmissible as *res gestae*. And, furthermore, the record shows McHugh's statement to the engineer was not introduced for the purpose of explaining, illustrating, or characterizing the transaction, or any phase of it, but was introduced for the purpose of showing that the engineer made no reply thereto.

It is plain that the silence of the engineer, and his failure to reply to the remarks, criticisms, and inquiry made by McHugh after the transaction was ended, in no way tended to illustrate or explain any fact or circumstance material to the issue. Moreover, the engineer was not required to reply to what McHugh said. (*Blue Ridge L. Co. v. Price*, 108 Va. 652, 62 S. E. 938; *Luby v. Hudson Riv. Ry. Co.*, 17 N. Y. 131; *Chicago City Ry. Co. v. White*, 110 Ill. App. 23; *Adams v. Railroad*, 74 Mo. 553, 41 Am. Rep. 333; *Vicksburg & Meridian Railroad v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299.) He was no more called upon to answer McHugh on that occasion than he would have been had McHugh met him on the street a week after the accident and made a similar statement to him. (*Barker v. St. L., I. M. & S. Ry. Co.*, 126 Mo. 143, 28 S. W. 866, 26 L. R. A. 843, 47 Am. St. Rep. 646.)

Suppose, for example, that, immediately after McHugh made the statement referred to, some other bystander or onlooker had exclaimed to the engineer, "Mr. Engineer, the boy started to cross the track when the train was within a few feet of him," and another spectator had declared to the engineer, "The care with which you were operating and moving the train prior and up to the time the boy was struck, and the alertness and celerity with which you acted when the boy started towards the track, were commendable," and another observer of the transaction had said to him, "The boy entered upon the track when the train was within a few feet of him, but you did all that could be done under the circumstances to avert the accident." I do not think that it will be seriously contended that declaration such as I have suggested would be admissible in evidence. And yet it must be conceded that any one of them would be as much a part of the *res gestae*, had it been made on that occasion, as the exclamation of McHugh to the engineer. To further illustrate: Suppose the engineer, in reply to McHugh's declaration, had said: "The train was going not to exceed eight miles an hour, the bell was ringing, and I was keeping a vigilant lookout ahead. The boy stepped upon the track when the

engine was within a few feet of him. I did all in my power to stop the train before he was hit, but was unable to do so." Would it be contended that this would have been available to the defendant in its defense? Certainly not, because it is apparent that any explanation the engineer might or could have made in response to the inquiry made by McHugh would, under the circumstances, have been a mere narration of a past and completed transaction only. In other words, it would be a case of a party speaking about the event, rather than a case of the event speaking through the party. The authorities uniformly hold that statements which are only a narration or history of completed transactions are never admissible in evidence as a part of the *res gestae*. The following are a few of the many authorities that illustrate and support this rule: 24 A. and E. Ency. L. (2d Ed.) section 110; Gillett on Ind. and Collat. Evi. section 263; Underhill Crim. Evi. p. 120; 2 Jones, Evi. section 348; Wharton, Crim. Ev. (9th Ed.) 264; 16 Cyc. 1258, 1259; 2 Rice, Evi. p. 387; 1 Elliott, Evi. sections 539, 543; *People v. Davis*, 56 N. Y. 95.

Now, if I am right in my conclusion that any explanation the engineer might have made to McHugh's inquiry would have been inadmissible, it necessarily follows that the question itself was inadmissible.

The views herein expressed are not in conflict with the general rule announced in the cases, with possibly one or two exceptions cited in the opinion written in this case by the Chief Justice. In nearly every case cited by the Chief Justice, the declarations were made by a party who was either a victim of the event or transaction under investigation, or by some one who was to some extent instrumental in bringing it about, or had some responsibility in connection with the matter, or by a bystander who had become an actor or participant in the sense as I have hereinbefore stated. Nor is what I have herein said at variance with the rule declared by the authorities, except as to a few cases cited in the notes to the case of *Louisville v. Johnson*, *supra*, in support of the conclusions therein reached by the annotator. A large number

of criminal cases are cited in the notes referred to, and some seven or eight of these cases are cited by the Chief Justice in the opinion written by him. But in nearly every criminal case cited by the Chief Justice the declarations were either made by the victim of the affray or by the defendant, or some one in the presence and hearing of the defendant, and in some cases the statements were made directly to the defendant. Therefore they are not directly in point on the questions here involved. The rule is well settled that declarations of a person not a party to the affray or transaction constituting the crime charged, made at the time or immediately after its commission in the hearing of the defendant which tend to illustrate, explain, or characterize any fact or circumstance material to the issue, are admissible in evidence.

The general rule is well and tersely stated in 21 Cyc. 943, as follows: "On the trial of an indictment for murder, declarations made by the deceased shortly after receiving the fatal wound may be admitted in evidence as part of the *res gestae*, although they were not made in the presence of the defendant." On page 944 of the same volume, it is said: "Declarations of third persons are as a rule not admissible, but a statement made directly to defendant with reference to the crime, and to be judged by his conduct, may be admissible as a part of the *res gestae*." The criminal cases cited in the notes referred to, and in the opinion written by the Chief Justice, in the main, illustrate this general rule. In the case of *Young v. State*, 149 Ala. 16, 43 South. 100, cited by the Chief Justice, where a bystander said, "Come back, it was an accident," the defendant, in response to the declaration, immediately returned. And, as stated in the opinion, "it was competent as showing, or tending to show, the conduct or demeanor of the defendant at or about the time of the shooting." So in the case of *People v. McArron*, 121 Mich. 1, 79 N. W. 944, the declaration, "now, see what you have done!" was addressed to the defendant by his mother immediately after his affray with the deceased, to which the defendant replied, "I will show him." In *State*

v. Kaiser, 124 Mo. 651, 28 S. W. 182, the declaration: "Hurry up! They have about killed this man"—was made under the following circumstances by a woman who was a witness to the affray: The woman had a controversy with the defendant Kaiser about the affray while he and the other two assailants were in the act of beating the deceased. She thought, as they were leaving the scene of the crime, that Kaiser was going to strike her, and she "hurried up and rushed into Mr. Van Phul's arms" and made the declaration referred to. The court, in the course of the opinion, says: "It was an exclamation made by a person on the spot, in the presence of the assaulted man, and while his assailants were yet in sight, just leaving their victim, and when the witness who heard the exclamation, the dying man, the woman who made the exclamation, and the fleeing assailants were still within fifty feet of each other." Under these circumstances, the woman herself was in a certain sense an actor and a participant in the transaction. If the engineer in the case at bar had been charged with and was on trial for criminal negligence for causing the death of the boy Cromeenes, the rule as stated in 21 Cyc. 943, 944, and announced in nearly all of the criminal cases cited by the Chief Justice, might have some application. But as this is a civil action in which the engineer is not even a party defendant, the authorities last referred to, in the main, neither support nor controvert the views herein expressed.

Appellant also assigns as error certain remarks made by one of the attorneys for respondent in his argument to the jury, to which remarks appellant, at the time, duly excepted. While I am of the opinion that counsel, in his reflections upon and criticisms of McHugh as a witness, went to the very border, if he did not exceed the limits, of legitimate and proper discussion, yet McHugh being respondent's principal witness, and the one upon whose evidence he mainly relied for a recovery, and there being nothing in the record, as I read it, to justify an inference that he was an unwilling witness, the argument 12 was prejudicial, if at all, to respondent rather than to

appellant, as its natural tendency was to minimize the effect of McHugh's evidence, which from the beginning to the end was favorable to respondent. Furthermore, while I am of the opinion that, as an abstract proposition, it was error for the court to admit evidence of the statement made by McHugh on the occasion referred to, I am as clearly of the opinion that it was not prejudicial error. At the time the evidence was offered, counsel for respondent in answer to the objection made by appellant to its admission, stated to the court, in the presence and hearing of the jury, that "the important thing is what the engineer failed to say; it was up to him." The evidence having been offered for that purpose only, I fail to see wherein it could have prejudiced the rights of appellant. The only possible effect detrimental to appellant's interests that can be claimed for McHugh's statement to the engineer, and the remarks of counsel complained of, under the circumstances, is that they tended to arouse the passions and prejudices of the jury against appellant to such an extent as to influence their verdict. I am of the opinion, however, that the verdict itself which, under all the facts and circumstances, is not at all excessive, shows conclusively that the matter complained of could have had no such effect on the jury.

There being no prejudicial error in the record, the judgment is affirmed, with costs to respondent

STRAUP, C. J. (concurring). I concur in the result affirming the judgment. What principally causes our disagreement relates to the action of the court overruling the objection to the question propounded to the witness McHugh. I think no error was committed in the ruling. McHugh was a brakeman on the train going north. He saw the train running south approaching the deceased. He saw the deceased walking toward and standing near the track. He saw, what was apparent to any one seeing what he saw, the perilous situation of the deceased. He swung his arms and shouted to attract the attention of the engineer of the

approaching train, and also of the boy. He further testified that he apparently attracted the attention of the engineer, for the train slowed down, but ran on and hit the boy; that the train, on which the witness was, stopped a little before the other train ran over the deceased; that as soon as that happened it also stopped; and that the witness then a few car lengths away, immediately went up to the engineer, who was standing in the gangway, and said: "You have done a damn fine job. Why didn't you stop before you ran over him?" From the situation disclosed by the evidence, the question propounded to the witness apparently called for something which might well be of the *res gestae*. That is, it cannot be said that the main transaction had so completely ended that the question propounded could not call for a declaration or statement prompted by or made under the immediate and present influences of the principal transaction or main event, and so related thereto as to characterize or explain it. It is well settled that it is not error to overrule an objection to a question when the answer may or may not be admissible. This is conceded; but it is said that the trial court, when the ruling was made, had before it the answer which the witness had made at a former trial in response to a similar question, and that the court therefore knew what answer the witness would make if permitted to answer. The record shows that the answer made by the witness at the former trial was shown to the court. But the question which was propounded to the witness and the answer which was made by him at the former trial is not in the record. I therefore do not know what the answer was that the court looked at. I cannot assume that the witness answered the same at both trials. We know witnesses frequently do not do so. Whatever presumptions in that regard may be indulged, those which are in favor of, and not those against, the ruling ought to be indulged. Appellant has the burden of specifically showing the alleged error by the record, not by presumptions or inferences.

Furthermore, I think the answer was properly received under the *res gestae* rule. It is said that it was not proper

(1) because the declaration was that of a bystander or observer, and not that of an actor or participant, or of one connected with the preceding circumstances or transactions to which the declaration related, and (2) because the declaration was a mere criticism, or comment, or opinion, of the declarant, and that, too, of a bystander or mere observer. The general limitations of the *res gestae* rule, so far as necessary here to be noticed, are: (1) The declaration or utterance must be spontaneous or instinctive; (2) it must relate to or be connected with a main or principal event or transaction itself material and admissible in evidence; and (3) it must have been the result or product, the outgrowth, of the immediate and present influences of the main event, or preceding circumstances, to which it relates, and it must be contemporaneous with it and tend to explain or elucidate it.

The declarant here witnessed the entire occurrences and happenings of the main event—the accident. He saw the movements of the train, the movements and position of the boy, and the collision. What he saw prompted and induced what was done by him. It as well prompted and induced what was said by him. Both were produced by the immediate influences of the preceding circumstances—the main event. Both related to and tended to elucidate or explain the main event, which, of course, was itself material and admissible in evidence. I cannot see how what was done by the declarant can be received, but what was said by him rejected. Both occurred about the same time and were equally related to, and were prompted and induced by the present and immediate influences of, the main event. True, the declaration was made just after the boy was run over; the declarant testified, “just as soon as it happened.” But it was the immediate present influence of the happening of that fact which prompted the declaration and to which it related, which it tended to explain or characterize. Whatever grounds for difference of opinion may have arisen in cases as to whether the declaration was contemporaneous or coincident with the main event or transaction, I see no ground for such difference here. The two were as nearly contem-

poraneous as two things could well be. As many times explained by the courts, the word "contemporaneous" is not taken literally, and that time is not the real governing factor in the determination, but is only important in determining whether the statement was spontaneous and intimately connected with the main transaction, and was prompted or produced by its immediate and present influences. I have no doubt that the declaration here was the natural and spontaneous outgrowth of the main event or preceding circumstances, to which it related and tended to explain, and that their relation to each other was of immediate cause and effect, and that the declaration was an instinctive and unmeditated utterance made while the impressions produced by the main event had full possession of the declarant's mind. A declaration made under such circumstances is, I think, admissible, whether made by an actor or participant or by one otherwise connected with the main event or transaction, or by a bystander or observer who witnesses or observes happenings and occurrences of the transaction or event. And to that effect are the text-writers and cases generally.

Says Mr. Wigmore, in his work on Evidence (volume 3, sec. 1755) :

"That nervous excitement which renders an utterance admissible may exist equally for a mere bystander as well as for the injured or injuring person, and therefore the utterance of either, concerning what they observed, are equally admissible. . . . In a few courts, the declarations of a mere bystander have been excluded. But, in the greater number, no such discrimination is made—assuming, of course, that the bystander's declarations relate only to that which has come under his observation."

Mr. Elliott, in his work on Evidence (volume 1, sec. 550), says: "Declarations of bystanders may be so connected with the transaction as to characterize and be part of it. When this is the case they are admitted on the same theory as if they had been made by one of the actors." To the same effect is 1 Whart. Ev. sec. 260, and 11 Ency. Ev. p. 337.

In notes to the case of *Louisville R. Co. v. Johnson*, reported in 20 L. R. A. (N. S.) 133, where many cases on this question are collated and reviewed, I think it is very clearly shown that the weight of authority is to the effect that exclamations and declarations of bystanders or observers, who witness or observe the transaction or event to which the declarations relate, are admissible as of the *res gestae*, if, of course, made spontaneously or instinctively, and are otherwise shown to be admissible under the rule. I know expressions may be found in some cases, frequently dicta, that to admit a declaration in evidence as part of the *res gestae* the declarant himself must in some way be connected with or related to the transaction, and that it is not enough that he be a mere observer of or witness to the transaction. But the text-writers, and the courts generally, say, as does Mr. Elliott, that it is the declaration, not the declarant, that must be related to, or connected with, the transaction. It is the declaration, not the declarant, which is required to be the product, the outgrowth, of the transaction. Of course, there must, in any case, be a sufficient showing that the statement or declaration related to or was connected with the transaction, and was prompted by its immediate and present influences, and was made under such circumstances that its spontaneity is assured. A condition of nervous excitement may be as readily produced in one witnessing or observing the occurrences of a transaction as is an actor or a participant therein, and the one, as well as the other, may be prompted by the natural and immediate influences of the transaction, to spontaneously and instinctively declare or exclaim something relating to and explaining it. Indeed, as said in the notes to the case of *Louisville R. Co. v. Johnson*, 20 L. R. A. (N. S.) 134:

"It would seem that the apparently involuntary, spontaneous, and contemporaneous declarations or exclamations of a bystander who had just witnesses an accident or affray in which he had otherwise no part or connection would be entitled to greater credence than similar exclamations or declarations by one who was an actor or participant therein, and who might therefore have had an interest in giving a particular

aspect or color to the event, because of the greater probability in the former case than in the latter that the exclamations or declarations which were in appearance spontaneous and involuntary were in fact such, and not the product of rapid reflection and consideration."

If, as the courts and the text-writers say, the test of admissibility of a declaration as of the *res gestae*, is whether the declaration is the result of the transaction talking through the declarant, or the declarant talking about the transaction, then what does it matter whether the transaction talks or speaks through the passive instrument of an actor or participant therein, or of one witnessing or observing the transaction? These views are not in conflict with the case of *Ganaway v. Salt Lake Dramatic Ass'n*, 17 Utah, 37, 50 Pac. 830. There the court held the statements of the "onlookers" not instinctive, but mere expressions of opinions with respect to the legal authority of the officer to eject and arrest the plaintiff. The court there approvingly quoted from Wharton that "exclamations of bystanders, if instinctive, are in like manner admissible" as those of actors or participants.

Of course "mere comments or criticisms by bystanders" are not admissible under the rule. Nor are the comments and criticisms of actors or participants admissible. They are inadmissible, not because made by a bystander, though a witness to, or an observer of, the transaction, but on the ground that they are not spontaneous or instinctive utterances prompted or caused by the immediate and present influences of the transaction. In other words, they are ordinarily the result of the declarant talking about the transaction, and not the transaction talking through the declarant, and oftentimes do not even tend to explain or illustrate it. And for the same reasons, oftentimes, mere opinions of the declarant, whether an actor or a participant or an observer, are likewise inadmissible under the rule. An opinion expressed by a declarant in the course of a mere conversation and as the result of it, or of reflection or afterthought, though at the scene of the transaction and immediately after

it happened, would not be admissible as a part of the *res gestae*. Neither would any other remark or declaration made under such circumstances. They are not, in such case, the outgrowth of the transaction to which they relate, but of the conversation or reflection; and hence are not part of the *res gestae*. But if the declaration is the spontaneous or instinctive utterance of the declarant, and was produced by the immediate and present influences of the transaction before there was time to reflect, contrive or misrepresent, and was rendered, as said by Mr. Wigmore, "while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance," then the declaration is admissible, though it is partially or wholly the expression of an opinion or conclusion.

I may again observe that when the declarant is but the passive instrument through which the event itself speaks, it does not matter whether it speaks in pious or impious language, or exclaims an opinion or conclusion, or a fact. Of course, the opinion, or conclusion, like any other declaration, to be admissible under the rule, must tend to explain or elucidate the main event or transaction. The fact that the declaration is in form a conclusion or opinion may be important in determining whether the declaration or utterance was spontaneous or instinctive, or was the result of reflection or afterthought, and whether it tended to explain or characterize the transaction. But if the declaration has all other essentials rendering it admissible under the rule, it is not to be rejected because it expresses an opinion or conclusion. And to that effect is the weight of authority (11 Ency. Ev. 318) and the case of *Wilson v. Southern Pac. Co.* 13 Utah, 352, 44 Pac. 1040, 57 Am. St. Rep. 766. There, within three minutes after the collision, the plaintiff walking over to a switchman, and, addressing him, asked, "Who is to blame for this?" The switchman replied, "It was the engineer." Notwithstanding the contention made that the statements were a subsequent narrative of the event and expressions of opinion as to how it occurred, etc., this court said that they were "the immediate expressions brought into

play by the occurrences of the occasion" with which they were connected, and were properly received as a part of the *res gestae*."

Though it may, therefore, be said that a portion of the declaration here was the statement of an opinion or conclusion, nevertheless that alone did not render it inadmissible. A statement or declaration of a conclusion or opinion, assuming, of course, that it was made spontaneously or instinctively and relating to the main event, may explain or characterize the transaction out of which it grows, and to which it relates, quite as well as a spontaneous statement or declaration of facts. This is well illustrated in the case of *Johnson v. State*, 8 Wyo. 494, 58 Pac. 761, where the deceased, immediately after the shooting, and upon being asked how it occurred, said the defendant "shot me, but he did not intend to do it." In *State v. Sloan*, 47 Mo. 604, where the deceased, while the surgeons were dressing his wounds, said to them that the defendant "was not in fault." In *Shotwell v. Commonwealth* (Ky.), 68 S. W. 403, where the deceased said, "I am shot all to pieces for nothing that I have done to be killed for." In *Fuller v. State* (Tex. Cr. App.), 48 S. W. 183, where the deceased said that the defendant "shot me for forty cents." In *Selby v. Commonwealth* (Ky.), 80 S. W. 221, where, in an affray, one who grabbed the pistol, whereupon it was discharged, killing a member of the party, said, "Boys, you see that it was an accident." In *Young v. State*, 149 Ala. 16, 43 South, 100, where in an affray, the deceased was shot, and the defendant and the crowd had ran away, a bystander and an observer said: "Come back, it was an accident." In *People v. McArron*, 121 Mich. 1, 79 N. W. 944, where one who witnessed an affray, immediately after its occurrence, said, "Now, see what you have done!" In *State v. Kaiser*, 124 Mo. 651, 28 S. W. 182, where a bystander, while the assailants were still in sight just after leaving their victim, said: "Hurry up! They have about killed this man." In *Cross Lake Logging Co. v. Joyce*, 83 Fed. 989, 28 C. C. A. 250, where the plaintiff, within a moment after the accident,

addressing the superintendent, said, "I wouldn't have lost my leg if you had done as you agreed to and put another man in his place." In *Coll v. Easton Transit Co.*, 180 Pa. 618, 37 Atl. 89, where an employee of the company whose car ran over and killed the deceased said to a bystander, "I did not have time to get him off." In *Omaha & R. V. Co. v. Chollette*, 41 Neb. 578, 59 N. W. 921, where a passenger was injured by the sudden starting of the train as he was alighting, the brakeman said, "It beats hell they cannot stop long enough to let people get off." In *Trumbull v. Donahue*, 18 Colo. App. 460, 72 Pac. 648, where a brakeman, seeing a passenger's injured hand, said to the conductor, "Look what this door has done to this man's hand." In *Elledge v. Railway Co.*, 100 Cal. 282, 34 Pac. 720, 852, 38 Am. St. Rep. 290, where a cliff of rock fell, the foreman, when it came down, and the plaintiff and others were buried in the debris said, "My God! I expected that." In *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25, 70 Pac. 111, where the superintendent of the railroad, who arrived about three hours after the occurrence of the wreck, and in looking at the flanges, said: "This puts me in a devil of a fix. I can't be putting new wheels under the cars all the time. If the company use any more Tacoma wheels, I will not work any longer for them." In *International & G. N. R. Co. v. Bryant* (Tex. Civ. App.), 54 S. W. 364, where the engineer, shortly after the accident, said, "If he had not applied his air he would have killed the whole business."

These cases are not cited, as erroneously assumed by Mr. Justice McCarty, to show the admissibility of declarations of bystanders or observers. I have already, in this opinion, expressed my views on that question, in support of which I cited, quoted from, and relied upon the text-writers, the cases cited by them, and those collected and reviewed in the notes found in 20 L. R. A. (N. S.) 133. The last cases here cited by me are not cited in support of such a question, but, as stated, in my opinion, in support of my views that a declaration having all other essentials to render it admissible under the *res gestae* rule is not to be rejected because it is

in the nature of an opinion or conclusion, and that such a declaration may quite as well explain or characterize the main event to which it relates as a declaration of fact. In all these cases, cited by me in support of such views, the declarations were admitted as a part of the *res gestae*; and in all of them, some more than others, the declarations were of the nature of either conclusions or opinions. They tended, however, to explain or characterize the transactions to which they related. So did the declaration here, though blunt and emphatic as a portion of it was.

Furthermore, the portion of the declaration, "Why didn't you stop before you ran over him?" certainly is not an expression of an opinion or conclusion. And since the question was proper, if there was any portion of the answer which was not proper, a motion to strike that which was improper ought to have been made.

The question is asked that had a bystander (one who witnessed or observed the accident) or the engineer declared to the effect that the boy stepped immediately in front of the moving train, and that the accident was unavoidable, would that have been *res gestae*? If such statements had been made, and were spontaneous and instinctive utterances prompted by the immediate and present influences of the accident, and were not the result of reflection or design, and were not mere narratives (as some of the statements put by my associate seem to be), I readily answer it in the affirmative, and to that effect are the cases: *Little Rock Ry. & El. Co. v. Newman*, 77 Ark. 599, 92 S. W. 864; *Kansas City So. Ry. Co. v. Moles*, 121 Fed. 351, 58 C. C. A. 29; *M. K. & T. Ry. Co. v. Vance* (Tex. Civ. App.), 41 S. W. 167; *Keyser v. C. & G. T. Ry. Co.*, 66 Mich. 390, 33 N. W. 867; *Springfield Con. Ry. Co. v. Welsch*, 155 Ill. 511, 40 N. E. 1034; *Hermes v. C. & N. W. R. Co.*, 80 Wis. 590, 50 N. W. 584, 27 Am. St. Rep. 69. It was so held in the cited case of *Louisville R. Co. v. Johnson*, *supra*, where the statement of the motorman operating the car which ran over and killed the deceased that, "I seen his face and all, and tried to make the stop, but couldn't make it," was held

properly received, but that the remark of the conductor to the motorman, "Keep your damned mouth still, and don't make any statement until you are called upon to make it," was improperly received because "it did not illustrate or explain how or what caused the accident," and "was an idle speech that had no connection with the case, and did not throw any light on any phase of it."

Whether the declarations make for or against one party or the other to the cause is not a determinative feature of their admissibility. They are alike admissible at the instance of either party. It is not essential that they be deserving. If shown to be admissible under the rule as stated, they may be received, though they might be wholly self-serving were they made under other circumstances. The basis of the rule is not admissions against interest, but trustworthiness of the statements, provable, not as the testimony of the declarant, but as a part of the transaction itself, like any other material fact or evidentiary detail.

I think no error was committed in the ruling complained of, and therefore concur in the judgment of affirmance.

FRICK, J. (concurring).

I concur with Mr. Justice McCARTY in the result reached by him and in all of his conclusions, except upon the question of *res gestae*. Upon that subject I agree with and indorse all that is said by the Chief Justice in his concurring opinion.

BILLS v. SALT LAKE CITY.

No. 2108. Decided June 3, 1910 (109 Pac. 745).

1. **APPEAL AND ERROR—BILL OF EXCEPTIONS—SUFFICIENCY.** Where the court submitted the case to the jury on all the issues presented by the pleadings, and, in the bill of exceptions, the court certified that there was evidence tending to establish all the issues, the bill was sufficient for a review of the instructions. (Page 510.)

2. **APPEAL AND ERROR—RECORD—CERTIFICATION.** Where exceptions to instructions were contained in the bill of exceptions which was certified to as correct by the trial court, the exceptions were properly before the appellate court without the certificate of the stenographer who noted the exceptions when they were made. (Page 510.)
3. **MUNICIPAL CORPORATIONS—DEFECT IN STREET—INJURIES.** In an action against a city for injuries to one who was thrown from his bicycle owing to an excavation in a street, the court instructed that plaintiff must prove the negligence alleged by a preponderance of the evidence, "and, if you find that the weight of the evidence is in favor of the defendant or that it is equally balanced, then the plaintiff cannot recover, and you should find the issues for the defendant." *Held*, that the instruction was not erroneous by reason of the quoted portion. (Page 511.)
4. **MUNICIPAL CORPORATIONS—DEFECT IN STREET—INJURIES.** An instruction that a person riding a bicycle, "being at a greater disadvantage with respect to obstructions than a traveler by team or machine, should use a degree of care equal to the risk, to wit, ordinary care, and as a matter of ordinary caution and prudence should observe the path or way being traveled, with a view to detect and avoid, if possible, any obstructions that would make it unsafe for a bicycle rider," was erroneous. (Page 512.)
5. **MUNICIPAL CORPORATIONS—DEFECT IN STREET—QUESTION FOR JURY.** The question whether a bicycle rider, or any other person who is injured while passing along a public street, has exercised the degree of care required of him by law in view of all the circumstances, should ordinarily be left to the jurors. (Page 513.)
6. **TRIAL—INSTRUCTION.** The trial court should not assume facts, unless they are undisputed or belong to a class where a court is bound to judicially note and declare them. (Page 513.)
7. **MUNICIPAL CORPORATIONS—DEFECT IN STREET—INJURIES.** Every one using a public street has a right to assume, and to act on the assumption, that the streets to the extent that they are open for travel are in a reasonably safe condition for that purpose. (Page 513.)
8. **MUNICIPAL CORPORATIONS—DEFECT IN STREET—CONTRIBUTORY NEGLIGENCE.** A traveler must avoid defects that are obvious and apparent, and, if he fails in this duty, he may be guilty of contributory negligence. (Page 514.)
9. **MUNICIPAL CORPORATIONS—DEFECT IN STREET—ACTION—INSTRUCTION.** In an action against a city for injuries to one riding a bicycle owing to an excavation in a street, an instruction that the city owed no greater duty to one riding a bicycle to "maintain its

streets in a reasonably safe condition for travel thereon than to a person riding or driving a horse" was not erroneous. (Page 515.)

10. MUNICIPAL CORPORATIONS—STREETS—CONDITION OF STREET—CARE REQUIRED. It is the duty of a city to exercise ordinary vigilance and care to detect defects in its streets, and to exercise ordinary and reasonable diligence to remove them. (Page 515.)

Appeal from District Court, Third District; *Hon. Geo. G. Armstrong*, Judge.

Action by William L. Bills against Salt Lake City.

Judgment for defendant. Plaintiff appeals.

REVERSED.

E. A. Walton for appellant.

H. J. Dininny and *P. J. Daly* for respondent.

FRICK, J.

This action was instituted by the appellant to recover damages which it is alleged he sustained by being thrown from his bicycle while riding thereon upon one of the streets of respondent city, which street, it is alleged, through the negligence of respondent, was in an unsafe condition for travel by reason of an excavation which was negligently permitted to be and remain therein. The respondent answered by denying all acts of negligence, and set up affirmatively that appellant was guilty of contributory negligence. The case was submitted to a jury upon the acts of negligence alleged in the complaint and upon the plea of contributory negligence. The jury found the issues in favor of respondent, and returned a verdict of no cause of action. The court entered judgment on the verdict, and the appellant brings the record to this court for review on appeal.

The assignments of error all relate to instructions given by the court.

Counsel for respondent insist that the errors assigned cannot be reviewed by us because the bill of exceptions does not contain all the evidence, but merely recites or states the effect of the evidence which was adduced by the parties in support of the respective issues contained in the complaint and answer. We can see no good reason, and none is suggested by counsel, why the bill of exceptions as proposed and allowed in this case is not sufficient, not only to authorize, but also to make it possible and convenient for, us to pass upon the exceptions to the instructions. All that a party ordinarily is required to preserve in a bill of exceptions is sufficient of the evidence to illustrate the exception and to enable this court to intelligently pass upon the question of law raised thereby. In the case at bar the trial court submitted the case to the jury upon all the issues presented by the pleadings, and, in the bill of exceptions, the court certifies (and this is not disputed) that there was 1 evidence introduced which tended to establish all of the issues. If this be true, and we must assume it to be so, the only question is whether in view of the proof the instructions excepted to state correct propositions of law. These questions may be determined as the bill of exceptions is prepared quite as well as if every word of the evidence were certified up. The objection of counsel for respondent therefore cannot prevail.

Nor is their contention tenable that the exceptions to the instructions are not properly before us, because the court stenographer has not certified to the exceptions. The exceptions are contained in the bill of exceptions, which is certified to as correct by the trial court. This is suffi- 2 cient without the certificate of the stenographer who noted the exceptions when they were made, since those exceptions by the statute are required to be taken in the presence of the judge. The first instruction excepted to reads as follows: "The burden of proving negligence rests upon the party alleging it, and, when a person charges negligence on the part of another as a cause of action, he must prove the negligence alleged in the complaint by a preponderance of

the evidence; and in this case if you find that the weight of the evidence is in favor of the defendant, or that it is equally balanced, then the plaintiff cannot recover, and you should find the issues for the defendant." (Italics ours.) It is contended that a requested instruction in which the italicized portion of the foregoing one was contained was condemned by this court in the case of *Hickey v. Railroad*, 29 Utah, 392, 82 Pac. 29. In that case an instruction quite similar in terms to the foregoing was passed on. From what was said, however, by Mr. Justice Straup, commencing on page 413 of 29 Utah, 82 Pac. 29, it is clear that the conclusion reached with respect to the instruction was based on the fact that the trial court in its own instructions had affirmatively charged the jury with regard to the proposition covered by the request, which, in effect, was no more than a negative statement of what had already been sufficiently covered by the court. It was accordingly held that the court committed no error in refusing the request. It is true that on page 414 of 29 Utah, 82 Pac. 29, it is said that a portion at least of the requested instruction did not correctly state the law. This statement was based upon the fact that the request was open to the construction that the plaintiff could not recover in the case if the evidence for and against the issue of his contributory negligence were "equally balanced." If the instruction in question were likewise open to such a construction, it, too, might be held erroneous. From a careful reading of the instruction given in this case, it will be seen that the court told the jury that the plaintiff "must prove the negligence alleged in the complaint by a preponderance of the evidence." This statement is immediately followed by the italicized and criticised portion, which refers to the weight of the evidence, and that the plaintiff cannot recover if the evidence is equally balanced. This refers to the quantum of proof necessary to sustain the allegations of negligence contained in the complaint, and nothing else. True, the trial court, in the last line of the instructions, speaks of "issues" in the plural; but from what the court had said before, and in view

of the other instructions, the instruction in question, when fairly considered, is not open to the construction that the plaintiff must fail if the evidence with respect to the issue of contributory negligence is equally balanced. While the wording of the instruction is not to be commended as a model, yet we think that the appellant was not prejudiced in any substantial right, and hence the giving of the instruction was not erroneous.

The next assignment relates to instruction No. 5, which, so far as material here, reads as follows: "You are instructed that a person riding a bicycle upon a street of Salt Lake City, *being at a greater disadvantage with respect to obstructions than a traveler by team or machine*, should use a degree of care equal to the risk, to wit, ordinary care as defined in these instructions, and as a matter of ordinary caution and prudence *should observe the path or way being traveled, with a view to detect and avoid, if possible, any obstructions that would make it unsafe for a bicycle rider.*" (Italics ours.) The appellant, while excepting to the instruction as a whole, also especially excepted to those portions which we have italicized. It will be ob- 4
served that in the introductory part of this instruction it is, in effect, assumed by the court that a traveler on a street while riding a bicycle is under all circumstances "at a greater disadvantage" with regard to obstructions than travelers "by team or machine." No doubt the jurors may always apply their general knowledge and experience to the facts in a particular case. They may thus consider the vehicle used by the traveler, if any, and what its peculiar natural characteristics are, and, in this connection, they may consider whether, by reason of the operation of the physical forces or natural laws, a traveler on one kind of a vehicle may be more readily affected by those forces than another on a different kind of a vehicle, but we cannot see how any court can say as a matter of law that a traveler on a bicycle under all circumstances is "at a greater disadvantage" in traveling on a street than other travelers are who are using

different kinds of vehicles. The question whether a bicycle rider or any other person who is injured while passing along a public street has exercised the degree of care required of him by law in view of all the circumstances should ordinarily be left to the jurors. It is for them to say whether in the light of all the circumstances the traveler was or was not "at a greater disadvantage," and, for that reason, should have exercised more care than he did. Moreover, it is always dangerous for a court to assume facts, and it should not do so unless the facts are either undisputed or belong to the class where a court is bound to judicially notice and declare them. We remark that if the instruction were not objectionable otherwise, and the case had in all other respects been fairly submitted to the jury, we might not be inclined to reverse the judgment upon the ground alone which we have just discussed. What follows in this instruction, however, cannot be considered otherwise than prejudicial to appellant's legal rights. The direction to the jury that it was appellant's duty "to detect and avoid, if possible, any obstructions that would make it unsafe for a bicycle rider," imposed a greater duty on him than the law requires. It is no doubt the duty of the traveler on a public street to make use of his senses with a view to avoiding injury, and to that end to exercise ordinary care for his own safety. We know of no rule of law by which the traveler is required to anticipate and thus to keep a special lookout for defects or obstructions in a public street. Every one using a public street has a right to assume, and to act on the assumption, that the streets, to the extent that they are open for travel, are in a reasonably safe condition for that purpose. In the case of *Pettengill v. City of Yonkers*, 116 N. Y., at page 564, 22 N. E., at page 1096 (15 Am. St. Rep. 422), the New York Court of Appeals, speaking through Mr. Justice Brown, states the law upon the subject now under consideration in the following words:

"A person using a public street has no reason to apprehend danger, and is not required to be vigilant to discover dangerous obstructions, but he may walk or drive in the daytime or nighttime, relying upon the assumption that the corporation whose duty it is to keep the streets in a safe condition for travel have performed that duty, and that he is exposed to no danger from its neglect."

By the foregoing it is not meant that the traveler is not required to look for and avoid defects or obstructions in the street. What is meant is that he need exercise ordinary care only to detect and avoid obstructions or defects that are obvious, and that may and ought to be detected, and hence avoided by the exercise of ordinary care when considered in the light of the law as stated in the foregoing quotation. The difference with respect to the duty which is cast on the officers of a city in whose charge the public streets are placed and that of a traveler on them in detecting obstructions or defects therein is admirably stated by Mr. Justice Bleckley in the case of *Wilson v. Atlanta*, 63 Ga. 294, where the rule is stated in the following language: "The duty of maintaining a street in a fit condition for safe use, though limited to ordinary diligence in those on whom that duty is cast, involves a very different measure of vigilance in foreseeing danger from that which a passenger is bound to exercise." It is accordingly held that the degree of vigilance to discover and remedy defects in streets is greater on the part of servants of the city than is imposed on the traveler to discover and avoid them. Yet it is held, and such, no doubt, is the law, that the traveler must avoid defects that are obvious and apparent, and, if he fails in this duty, he may be guilty of contributory negligence. The question, therefore, is ordinarily one of fact to be determined by the jury in the light of all the facts and circumstances. 8

Appellant also complains of instruction No. 6, in which the court, in effect, told the jury that the city owed no greater duty to one riding a bicycle to "maintain its streets in a reasonably safe condition for travel thereon than to a person riding or driving a horse." Appellant insists that

this, in effect, was a discrimination against the bicycle rider. We do not so construe the instruction. True, 9
the court should not make comparisons as between travelers. The true test for the court to follow is that it is the duty of the city to exercise ordinary vigilance and care to detect defects in its streets and to exercise ordinary care and reasonable diligence to remove them, and to exercise the same care to maintain its streets to the extent that they have been opened for travel in a reasonably safe condition for ordinary use and travel. The streets are 10
intended for such use, and, if they are placed and maintained in a reasonably safe condition for that purpose, the city has discharged its full duty, regardless of whether the streets are used by one kind of a vehicle or another, or whether used by one who walks or one who rides a horse.

For the foregoing reasons, the judgment must be, and it accordingly is, reversed; and the case is remanded to the district court, with directions to grant a new trial, appellant to recover costs.

STRAUP, C. J., and McCARTY, J., concur.

STATE v. MONTGOMERY.

No. 2100. Decided June 3, 1910 (109 Pac. 815).

1. CRIMINAL LAW—NEW TRIAL—DISCRETION OF COURT. In granting or refusing motions for new trials, discretion is vested in the trial courts. (Page 517.)
2. CRIMINAL LAW—APPEAL AND ERROR. Where there is substantial evidence to support a verdict, the appellate court cannot interfere with it. (Page 517.)
3. CRIMINAL LAW—APPEAL AND ERROR—DISCRETION OF TRIAL COURT. The appellate court may not usurp the functions of the trial court in exercising their discretion on a motion for a new trial. (Page 517.)

4. CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE. On a motion for a new trial newly discovered evidence *held* cumulative, and not “so conclusive in its character as to raise a reasonable presumption that the result of a second trial would be different from the first.” (Page 520.)
5. CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE. In order to authorize a new trial on the ground of newly discovered evidence it must be so conclusive in its character as to raise a reasonable presumption that the result of a second trial would be different from the first. (Page 520.)

Appeal from District Court, Second District; *Hon. J. A. Howell*, Judge.

Lorenzo Montgomery was convicted of felony and he appeals.

AFFIRMED.

J. H. DeVine and *J. N. Kimball* for appellant.

A. R. Barnes, Attorney-General, for the State.

FRICK, J.

Appellant was convicted in the district court of Weber County, Utah, of the crime denounced by section 4221, Comp. Laws 1907, which reads as follows: “Any person who shall carnally and unlawfully know any female over the age of thirteen years and under the age of eighteen years shall be guilty of a felony.” The female in question, hereinafter designated prosecutrix, was sixteen years of age when the sexual act complained of occurred.

The appellant, in substance, contends that the evidence is insufficient to sustain the judgment of conviction, and that the court erred in overruling his motion for a new trial. One of the grounds of the motion which is strenuously insisted upon is based upon newly discovered evidence. Concerning the contention that the judgment is not sustained by sufficient evidence, it is sufficient to say that the evidence with regard to the sexual act is in direct conflict.

The prosecutrix most emphatically stated in her testimony that the appellant, on or about the 16th day of August, 1908, had sexual intercourse with her while she and he were out riding together in his buggy; that she never had sexual intercourse with any one else either before or after the act in question, while appellant, upon the other hand, just as emphatically denies such intercourse either on that occasion or at any other time. There are some facts in evidence which, to some extent, tend to corroborate the prosecutrix, while the evidence in corroboration of appellant's claims is much stronger. In view of the circumstances there is no escape from the conclusion that neither the prosecutrix nor the appellant could be mistaken with regard to whether the sexual act took place or not. They either had or did not have the sexual intercourse as testified to by the prosecutrix. This, no doubt, is the view the jury entertained, and thus concluded that, under all the circumstances, the statements of the prosecutrix were more worthy of belief than were those of the appellant and his witnesses, none of whom, except the appellant, were present when the alleged offense was committed.

The question with respect to the weight of the evidence was fully and fairly submitted to the jury, and in view that there is substantial evidence in support of their verdict we are powerless to interfere. Moreover, the trial court, after having heard and seen the witnesses testify has approved the finding of the jury, and we must assume that he did so because he was satisfied with the result. It is elementary that, in granting or refusing motions for new trials, a certain amount of discretion is vested in the trial courts which they alone can exercise. This court may not usurp the functions of the trial courts and exercise this discretion for them in granting motions for new trials, and grant them whenever in our judgment, from a mere inspection of the record, a new trial should have been granted. Before we can reverse a judgment some good, legal cause therefor must affirmatively be made to appear. Nor can we, under the guise of reviewing an alleged abuse of

discretion of the trial court, pass upon the weight of the effect of the evidence. If there is substantial evidence in support of the verdict, we are powerless to interfere with it, except upon questions of law. This is the clear import of our Constitution and has become the settled policy of this court as appears from the following, among other cases: *State v. Moore*, 36 Utah, 521, 105 Pac. 293; *State v. Endsley*, 19 Utah, 478, 57 Pac. 430; *State v. Webb*, 18 Utah, 441, 56 Pac. 159; *State v. Halford*, 17 Utah, 475, 54 Pac. 819; *State v. McCune*, 16 Utah, 174, 51 Pac. 818. From the foregoing it follows that we cannot disturb the judgment upon the first ground referred to.

At the trial of the case a physician was called as a witness who testified on behalf of the state that at the time of the trial the prosecutrix was pregnant and that she had been so for a period of about five or five and one-half months, and that he could fix the time of conception within about one-half month. The trial took place on the 9th day of February, 1909, and as we have seen, the sexual act in issue, as testified to by the prosecutrix, occurred on or about the 16th day of August, 1908, or not quite six months before the trial. Two physicians filed affidavits in support of the motion for a new trial from which it, in substance, is made to appear that the prosecutrix was delivered of a child on the 28th day of March, 1909, and that on the 9th day of April following the said physicians examined said child. One of the physicians in his affidavit says "that said child, if not a full-term child, was about an eight-months child; that is, said child was born a period of about eight months after date of conception." The other physician testified "that said child, if not a full-term child, was not less than an eight-months child." It is contended that in view of the testimony of the prosecutrix, she must have conceived on August 16, 1908; that from that date to the date of the birth of the child is only about seven and one-half months, in fact a few days less than that; that if the child was an eight-months child, as the physicians state it was, then the sexual act complained of could not have taken place as the prosecu-

trix testified it did, and hence it is contended she is further contradicted by these circumstances, and the appellant's testimony is correspondingly corroborated thereby. This does not necessarily follow. True, the normal period of gestation of the human species, as known and recorded for over 3000 years, is from 270 to 280 days, or approximately nine calendar months. It is equally well known that some births occur within a much shorter period, and while such occurrences are not frequent they do sometimes occur in a shorter time even than was the case this instance. *Peterson v. People*, 74 Ill. App. 178; *Hull v. State*, 93 Ind. 128. It will be observed that neither of the physicians (who, we must assume, made the strongest possible statement, they could in their affidavits in behalf of appellant) says that the child of which the prosecutrix was delivered on March 28, 1909, was a full-term child, but they in effect testify that it was about an eight-months child. The exact time that elapsed between August 16, 1908, the date of the alleged sexual act, and the date of the birth of the child, was 225 days, or, if expressed in months, about seven and one-half months. From the affidavits of the two physicians it is also made to appear that they did not see and examine the child until the 9th day of April, 1909, or nearly two weeks after it was born. The fact that they say that if the child was not a full-term child it was about an eight-months child may thus, in a measure at least, be accounted for. At all events it does affect the weight to be given to their statements. Moreover, to use the term "about eight months" is not far from saying seven and one-half months. There is, therefore, no serious conflict between the facts stated by the physicians in their affidavits in support of the motion for a new trial and the conclusions that may be deducted from the statements of the prosecutrix, when considered in connection with the date of the birth of the child and the statements with respect to whether it was a full-term child or not. That such discrepancy is not a cause for granting a new trial when, as in this case, there is direct and positive evidence of the sexual act, is well and clearly illustrated in the two cases last above referred to.

Assuming, but not deciding, that the facts stated by the two physicians come within what is usually denominated as newly discovered evidence, yet those facts in one sense also clearly come within what is termed cumulative evidence. In no event, therefore, is this so-called newly discovered evidence "so conclusive in its character as to raise a reasonable presumption that the result of 4, 5 of a second trial would be different from the first," which would have to be the case in order to authorize us to grant a new trial. (*Armstrong v. Davis*, 41 Cal. 499; *Stoakes v. Monroe*, 36 Cal. 388; Hayne, New Tr. and App., sec. 91.)

In view of the foregoing, we cannot interfere with the verdict of the jury, and especially not when the trial court has reviewed and approved the jury's findings.

The judgment therefore is affirmed, with costs.

STRAUP, C. J. and McCARTY, J., concur.

ROBINSON v. SALT LAKE CITY.

No. 2122. Decided June 3, 1910 (109 Pac. 817).

1. **JUDGMENT—FORMAL REQUISITES.** Where there is no statute requiring a judgment to be in any particular form, it is sufficient if by the use of proper language it is stated what the prevailing party shall receive and what the losing party is required to do, pay, or discharge. (Page 523.)
2. **TRIAL—NONSUIT—HEARING ON MOTION.** On a motion for a nonsuit, nothing is before the court except the question whether, in view of the evidence before the court, the case is one which should be determined as a question of law, and, if the motion is granted, the only judgment that is permissible is one dismissing the action, and such a judgment arrests any further proceeding in that action except on appeal. (Page 523.)
3. **JUDGMENT—BAR—JUDGMENT OF NONSUIT.** On sustaining a motion for nonsuit, the judgment rendered is not a bar to a future action upon the same cause of action.¹ (Page 523.)

¹ *Guthrie v. Gilmer*, 27 Utah, 496, 76 Pac. 623.

4. **TRIAL—MOTION FOR NONSUIT—JUDGMENT.** A judgment roll after giving the title of the cause, reciting that the cause came on regularly for trial, that a jury was duly impaneled, that witnesses were sworn and examined on behalf of plaintiff, that plaintiff rested, that counsel for defendant moved for judgment of nonsuit and dismissal, stated that, "the court having considered and now being fully advised in the premises, it is ordered that the motion be and the same is hereby granted and the within case dismissed." *Held* to constitute a judgment sufficient to arrest all further proceedings. (Page 524.)
5. **APPEAL AND ERROR—APPEALABLE ORDERS—NONSUIT.** Such judgment was a final one and appealable. (Page 524.)
6. **APPEAL AND ERROR—ENTRY IN JUDGMENT BOOK—"JUDGMENT ROLL."** Comp. Laws 1907, sec. 3195, provides that the clerk must enter judgments in a book "called the judgment book." Section 3197 provides that, immediately after entering the judgment, the clerk must attach and file certain papers including "a copy of the judgment," which constitutes the judgment roll. Section 3301 provides that an appeal may be taken within six months from the entry of the judgment appealed from. *Held* that, before an appeal can be taken from a judgment, it must be entered in the judgment book. (Page 525.)
7. **APPEAL AND ERROR—TIME FOR PROCEEDINGS—ENTRY OF JUDGMENT.** The time from which an appeal may be taken dates from the entry of the judgment. (Page 525.)
8. **APPEAL AND ERROR—PRESUMPTIONS—PERFORMANCE OF DUTY BY CLERK.** Comp. Laws 1907, sec. 3195, provides that the clerk must enter judgments in a book "called the judgment book." *Held*, that it would be presumed on appeal, where nothing appears in the judgment roll to the contrary, that the clerk entered the judgment in the proper book before the judgment roll was made up, and this presumption will not yield to a collateral attack by affidavit, but can only be overcome by an amendment to the record.² (Page 525.)
9. **MUNICIPAL CORPORATIONS—INJURIES FROM DEFECTS IN STREET—ACTIONS—QUESTION FOR JURY.** In an action against a city for injuries caused by an excavation in a street, evidence *held* sufficient to present a case for the jury on the question of defendant's negligence. (Page 527.)
10. **TRIAL—NONSUIT—QUESTIONS OF LAW.** Where plaintiff's evidence and the inferences therefrom would authorize reasonable men to arrive at different conclusions as to whether all the essential facts

² Warnock v. Peterson, etc., Co., 35 Utah, 542, 101 Pac. 699.

were proven, the question is one of fact, although the evidence on some points may be very unsatisfactory.³ (Page 527.)

11. MUNICIPAL CORPORATIONS—INJURIES FROM DEFECTS IN STREET—NOTICE OF DEFECT—QUESTION FOR JURY. Where, in an action against a city for injury resulting from an excavation in a street, the jury find that some stranger made the excavation, the question of whether the city had notice of its existence and character is one of fact.⁴ (Page 527.)

Appeal from District Court, Third District; *Hon. Geo. G. Armstrong*, Judge.

Action by John Robinson against Salt Lake City.

Order dismissing the action. Plaintiff appeals.

REVERSED AND REMANDED.

Thurman, Wedgwood & Irvine and E. A. Walton for appellant.

H. J. Dininny and P. J. Daly for respondent.

FRICK, J.

Appellant brought this action to recover damages for personal injuries which it is alleged he sustained by being thrown from his wagon while driving in one of the streets within the corporate limits of respondent city. It is alleged that said street was in a defective and dangerous condition for travel by reason of an excavation which respondent had caused to be made and had negligently suffered to remain therein. Respondent denied all the acts of negligence, and pleaded contributory negligence. At the trial, after appellant had produced his evidence and rested, counsel for respondent moved for a nonsuit. The court sustained the motion and dismissed the action; hence this appeal.

Counsel for respondent have interposed a motion to dismiss the appeal upon the ground "that no judgment has ever

³ *Brown v. Salt Lake City*, 33 Utah, 242, 93 Pac. 570, 14 L. R. A. (N. S.) 619, 126 Am. St. Rep. 828.

⁴ *Jones v. Ogden City*, 32 Utah, 221, 89 Pac. 1006.

been entered in this action." At the hearing the argument for dismissal was based upon two grounds: (1) That no judgment had been entered; and (2) that no judgment had been rendered in the action by the court.

We shall consider the last ground first. From the judgment roll as certified up by the clerk of the district court the following is made to appear: After giving the title of the case, and after reciting that the cause came on regularly for trial, that a jury was duly impaneled, that witnesses were sworn and examined on behalf of plaintiff, and that plaintiff had rested, the record continues: "Whereupon H. J. Din-inny (respondent's counsel) now moves the court for judgment of nonsuit and dismissal herein, . . . and, the court having considered and now being fully advised in the premises, it is ordered that the motion be, and the same is hereby, granted, and the within case dismissed." It is contended that the foregoing language does not constitute a judgment, and, if it is to be given any effect at all, it can be considered only as an order for a judgment. The statute does not require a judgment to be in any particular form.

Ordinarily a judgment is sufficient if by the use of 1, 2 proper language it is stated what the prevailing party shall receive and what the losing party is required to do, pay, or discharge, and in that way adjudicates and disposes of the matters in controversy. On a motion for a nonsuit nothing is before the court except the question whether in view of the evidence before the court the case is one which should be determined as a question of law. If a motion is granted, the only judgment that is permissible is one dismissing the action; that is, one which arrests any further proceeding in that action except on appeal. Such a judgment is not a bar to a future action upon the same cause of 3 action, and cannot be pleaded as such. (*Guthiel v.*

Gilmer, 27 Utah, 496, 76 Pac. 628.) For these reasons, the courts have held very informal judgments of dismissal sufficient to sustain an appeal, as is well illustrated by the following cases: In the case of *DeGraf v. Seattle, etc., Co.*, 10 Wash. 468, 38 Pac. 1006, a motion for a nonsuit was inter-

posed as in this case. As appears from the judgment roll in that case the judgment was in the following form: "Thereupon defendant's attorney moved the court for an order of nonsuit, which motion is granted upon due consideration thereof, and the cause is ordered dismissed and the jury herein duly discharged." The foregoing was held to be sufficient as a final judgment from which an appeal would lie. In *Koons v. Williamson*, 90 Ind. 599, the Supreme Court of Indiana held that the following constituted a final judgment from which an appeal could be prosecuted, to wit: "To which ruling of the court the plaintiff excepts, and the cause of action is dismissed at the cost of the plaintiff." No doubt it is the last clause of the quotation which constituted the judgment. In *Heegaard v. Dakota, etc., Co.*, 3 S. D. 569, 54 N. W. 656, the entry was as follows: "By the Court: The judgment is that the action be and is hereby dismissed." This, it was held, was sufficient in form to constitute an appealable judgment. It is not possible to draw a distinction between the cases just quoted from and the case at bar. But, entirely apart from authority, why is **4, 5** the language we have quoted in this case not ample to constitute a judgment which disposes of the action? As presented by the record, the language purports to be the action or judgment of the court dismissing the action and nothing else. This judgment arrested all further proceedings, and hence was a final judgment in the action, and, if so, was appealable.

The next contention is that the appeal should be dismissed herein because the alleged judgment was not entered in the judgment book, as required by section 3195, Comp. Laws 1907. This section, in effect, provides that the clerk must enter the judgments in a book "called the judgment book." By section 3197 it is also in substance provided that "immediately after entering the judgment the clerk must attach together and file the following papers which constitutes the judgment roll." These papers include "a copy of the judgment." In this case the judgment roll was made up as required by said section. Section 3301 provides: "An

appeal may be taken within six months from the entry of the judgment or order appealed from." From 6, 7 the provisions contained in the foregoing sections there remains little, if any, room to doubt that before the judgment roll is made up and before an appeal can legally be taken from a judgment, it must be entered in the judgment book, and that the time within which an appeal may be taken dates from such entry.

The question remains, however: How must the fact that a judgment has been duly entered be made to appear in the record on appeal? As we have pointed out, section 3195, *supra*, provides that the clerk must keep a judgment book in which he must enter the judgments, and that he must do this before he makes up the judgment roll. The duty to do these things is therefore imposed upon a public officer. The presumption therefore arises that the officer has regularly discharged the duties of his office which are imposed by law. (Lawson, Law of Presumptive Evidence [2 Ed.], p. 67.) The presumption therefore is that the clerk entered the judgment in the proper book before the judgment roll was made up. By an inspection of the judgment roll as made up by the clerk in this case nothing is made to appear therefrom that the clerk has not performed his duty. There is an affidavit presented, however, in which it is stated 8 that the judgment was not entered before the appeal was taken. This affidavit is, however, not a part of but is dehors the record. We have recently in effect held that, for the purpose of determining whether this court has jurisdiction or not, the record as certified up by the clerk until amended in due course is conclusive. (*Warnock v. Peterson, etc., Co.*, 35 Utah, 542, 101 Pac. 699.) If it is contended that the record does not speak the truth, it may not, for that reason be collaterally assailed by affidavit, but must be amended so as to conform to the actual facts, and until so amended this court is bound by the record as certified to by the clerk. By an inspection of the record, therefore, as certified up, we must indulge the presumption that the clerk discharged the duty imposed upon him by law, and that he

entered or caused the judgment to be entered in the judgment book before he made up the judgment roll, and, until this presumption is overcome by the record itself, the presumption must prevail. If this presumption is attacked and the record is assailed as not being correct, it must be corrected by way of amendment as above indicated. When a proposed amendment is found to be correct in point of fact and is allowed, then the record on its face may disclose the defect of jurisdiction, and when such is the case, and not otherwise, can the jurisdiction of this court be successfully assailed. For the foregoing reasons the motion to dismiss the appeal must be denied.

We will now proceed to a consideration of the case on the merits. From the evidence preserved in the bill of exceptions (excluding the formal proof) the jury were authorized to find, in substance, that the street in question was within the corporate limits of the respondent city; that it was open and generally used for travel; that early in February, 1909, one Sam Bates, who was then employed in the water department of respondent, dug an excavation in said street for the purpose of exposing the water mains or pipes laid therein; that the excavation was about four feet long, about two feet wide, and from three and one-half to four feet deep; that it was anywhere from four to fifteen feet from the ditch or gutter on the outside of the sidewalk and in the traveled portion of the street; that the earth was thrown back into the excavation in a loose manner; and that, by reason of the rains and the flat and wet condition of the soil, water had gathered and was standing in pools in different parts of the street, a portion of which covered the excavation in question; that the excavation had remained in the street in such condition for about four days before the happening of the accident; that while the street was in the condition aforesaid, and while appellant was driving his team hitched to his garbage wagon in the traveled portion of the street, one of his horses suddenly fell into the excavation, and immediately thereafter the front wheel of appellant's wagon also went into the "hole," as appellant called it; that this

caused the wagon to lurch to one side, by reason of which appellant was thrown from his seat on the wagon where he was riding into the street, and at least one of the wheels of the wagon passed over his leg, breaking the bones, and permanently injuring him and causing him much pain and suffering. We remark that the evidence on some of the points was not clear, and on others it was inferential rather than direct. Appellant after adducing evidence which tended to establish the foregoing facts rested, whereupon counsel for the city moved the court to grant a nonsuit upon the grounds: (1) That "the plaintiff has failed to make a cause of action within the allegations of his complaint;" and (2) "that he has failed to prove that the city made any excavation, or left any excavation in the street, or that anybody made an excavation in the street and it had been left for any length of time to charge the city with notice of the same." The court granted the motion and dismissed the action. Appellant now urges that the court erred in not submitting the case to the jury upon the evidence.

We are of the opinion that appellant's contention is correct. While there is nothing to indicate on which one of the grounds the court based its ruling, yet we think that, under the evidence, the case is one which should have been submitted to the jury on both grounds. We think the evidence is sufficient to authorize a finding that there was an excavation in one of the main thoroughfares of the city which caused it to be defective if not dangerous, and that appellant was injured while he was using the street for the purposes for which it is intended. True, the evidence may not be overwhelming, nor even strong on some of the points, and it may even tend to show contributory negligence; but whether the evidence is strong or weak, or whether there is some evidence of contributory negligence or not, is not the test. The test is whether or not there is some substantial evidence in support of every essential fact which a plaintiff is required to prove in order to entitle him to recover. If the evidence and the inferences are of the character which would authorize reasonable men

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to arrive at different conclusions with respect to whether all the essential facts were or were not proven, the question is one of fact and not of law. This is so although the evidence on some points may be very unsatisfactory or doubtful. (*Brown v. Salt Lake City*, 33 Utah, 242, 93 Pac. 570, 14 L. R. A. [N. S.] 619, 126 Am. St. Rep. 828.) This has so often been said by the courts that the rule has become elementary. The only difficulty arises in its application.

We think the court also erred upon the second ground. Whether the city caused the excavation to be made, or whether some stranger made it was a question of fact. Again, if the jury had found that some stranger made the excavation, or caused it to be made, the question of whether the city had or had not notice of its existence and character was also a question of fact to be submitted to the jury under proper instructions. (*Jones v. Ogden City*, 32 Utah, 221, 89 Pac. 1006.)

In view of what has been said, the remaining assignment is immaterial.

For the foregoing reasons, the judgment is reversed, and the cause is remanded to the district court, with directions to grant a new trial, and to proceed with the case in accordance with the views herein expressed, appellant to recover costs.

STRAUP, C. J., and McCARTY, J., concur.

SNOW v. WEST.

No. 2115. Decided June 3, 1910. An Application for Rehearing. August 1, 1910 (110 Pac. 52).

1. JUDGMENT—CONSTRUCTION—CERTAINTY. Judgments should be construed as other writings, and are enforceable if they are certain in the light of the pleadings and the whole record, so that where the records show that a judgment for "the sum of 242.98," omitting the dollar mark, was for that sum of money, the judgment was sufficiently certain. (Page 532.)

2. **JUDGMENT—SET-OFF—JUDGMENT TO ANOTHER'S USE.** One to whose use a judgment is obtained in another's name can use the judgment by way of set-off against another judgment. (Page 533.)
3. **JUDGMENT—ASSIGNMENT—PAROL ASSIGNMENT.** A parol assignment of a judgment is valid, in absence of a prohibitory statute. (Page 534.)
4. **JUDGMENT—SET-OFF—MUTUAL JUDGMENT.** Whether mutual judgments may be satisfied by being set off against each other rests largely within the court's discretion, and judgments may be set off where the right to do so is clear, but ordinarily where different interests are involved, the application to set off judgments should be made in equity and controlled by equitable principals. (Page 534.)
5. **APPEAL AND ERROR—ASSIGNMENT OF ERROR—FAILURE TO ASSIGN ERROR—HARMLESS ERROR.** A judgment cannot be modified or reversed on appeal, because of an error of which no one complained. (Page 535.)
6. **EXEMPTIONS—PROPERTY EXEMPTED—JUDGMENTS.** Under Comp. Laws 1907, sec. 3244, providing that whenever any personal property exempt is levied upon or wrongfully sold under execution resulting damages shall be exempt from execution, a judgment for the value of exempt property wrongfully sold under execution was also exempt. (Page 535.)
7. **EXEMPTIONS—RIGHTS OF ASSIGNEE.** Since, under Comp. Laws 1907, sec. 3247, providing that non-residents or persons about to leave the state with the intention of becoming non-residents are not entitled to the benefits of the exemption laws, one who left the state in January, 1905, lost the right to have a judgment, rendered in an action begun March 6, 1906, exempt on the ground that it was for damages for wrongful levying on exempt property, one to whom he assigned the claim sued on in 1907 could not claim that the judgment rendered thereon was exempt. (Page 536.)
8. **EXEMPTIONS—LAPSED EXEMPTIONS.** That a judgment for damages for wrongfully levying upon exempt property was also exempt when rendered would not prevent a judgment against the person, in whose favor the exempt judgment was rendered, from being set off against such judgment, after it and the claim on which it was based had ceased to be exempt by the owner leaving the state. (Page 536.)

Appeal from District Court, Third District; *Hon. M. L. Ritchie*, Judge.

Action by A. E. Snow against E. M. West, in which M. R. Brothers, as assignee, was substituted as plaintiff.

Judgment allowing defendant to set off judgments. Brothers appeals.

AFFIRMED.

D. H. Wenger for appellant.

James Ingebretsen for respondent.

FRICK, J.

This was a proceeding to set off judgments. The court entered judgment allowing the set-off, and appellant presents the record on appeal.

The material facts in substance are: That on the 27th day of March, 1906, A. E. Snow, who is designated as plaintiff, commenced an action against respondent to recover the value of a certain law library and other property which said Snow claimed was exempt from execution and forced sale, and which said property had theretofore been seized and sold on an execution issued on a judgment in favor of respondent and against said Snow; that after said action was commenced by said Snow, he, on the 20th day of June, 1907, assigned his alleged cause of action to the appellant, subject, however, to the lien of Snow's attorney, and upon the condition that if judgment should be obtained in said action the proceeds (subject to the attorney's lien aforesaid) should be applied (1) to pay the sum of about \$475 owing by said Snow to appellant, the assignee, (2) to pay one Eliza Snow Dumford "my (Snow's) indebtedness to her, whatever the same may be," and (3) the remainder, if any, in equal parts to A. E. Snow and George L. Savage "to apply upon my (Snow's) indebtedness to them;" that thereafter, on the 12th day of September, 1907, a judgment was obtained in said action in favor of Snow and against respondent for the sum of \$1050 and costs, which judgment was, by this court, affirmed in

January, 1909 (*Snow v. West*, 35 Utah, 296, 99 Pac. 674), where it was held that the property involved in said action was exempt from forced sale on execution. It is also made to appear that on the 8th day of December, 1903, one F. H. Hyde in a certain action pending in the city court of Salt Lake City wherein said Hyde was plaintiff and said Snow was defendant a judgment was duly entered in said action in favor of said Hyde and against said Snow, which judgment, with interest, costs, and accrued costs, on the date judgment was entered in this proceeding, amounted to the sum of \$362.20; that in entering said judgment in said court it was entered in figures merely for "the sum of \$242.98," with the decimal point as indicated, but without any dollar sign or mark, or without expressly indicating in words what said figures stood for; that from the complaint filed in said action, and from an inspection of the record introduced in evidence, it is clear for what amount said action was brought and for what amount the court rendered judgment therein; that said action was brought in the name of said Hyde upon a promissory note made and delivered by said Snow to respondent, which note was assigned or indorsed to said Hyde, who was a collector, for collection, and said judgment, while in the name of said Hyde, nevertheless, was always in truth and in fact the property of respondent who paid the costs in said action and also paid said Hyde his commission or fees for obtaining said judgment; that said Hyde after said judgment was obtained as aforesaid, "turned over," as respondent puts it, or assigned the same to respondent and afterwards made a written assignment thereof to him; that on the 13th day of February, 1903, in the court last above named, respondent obtained another judgment against said Snow on which there was due, when the judgment appealed from herein was rendered, the sum of \$139; that the property belonging to said Snow was seized and converted as aforesaid in December, 1903, at which time he was a practicing attorney and resident of the state of Utah, and by reason of which said property was exempt to him; that in the month of January, 1905, and long before the assign-

ment of the claim by said Snow to appellant, and long before the judgment in said action was obtained, said Snow departed from and ceased to be a resident of the state of Utah and became a resident of Kansas City in the state of Missouri where he practiced his profession as a lawyer, and that at no time since his departure from the state of Utah as aforesaid has he been a resident thereof. It also appears that a notice of the assignment of the claim from Snow to appellant was served on respondent a few days after judgment was obtained in the action; that no part of the judgment has been paid by respondent, or otherwise, and the same is in full force and effect.

Upon substantially the foregoing facts the district court granted respondent's motion for set-off as follows: The court set off \$362.20, the amount of the judgment obtained by Mr. Hyde, and the further amount of \$139, the amount of the judgment obtained by respondent, which left unpaid and in force on the Snow judgment, on the date the set-off was made, the sum of \$653.35, and all costs. No one is here complaining, except the appellant, the assignee of Mr. Snow.

The first assignment of error to be noticed is that the court erred in permitting the judgment which was entered for "the sum of 242.98" to be set off, for the reason that the same is not a judgment for an amount certain and is therefore void. The cases of *Carpenter v. Sherfy*, 71 Ill. 427 and *Avery v. Babcock*, 35 Ill. 175, cited by appellant in support of his contention, seem to hold as contended for. We do not think, however, that those cases are based on sound legal principles. No doubt, judgments should be specific and certain. Judgments should, however, be read, construed, and applied as other writings are, and if 1
in the light of the pleadings and the whole record they are certain, they should be enforced. This, we think is the doctrine announced by the better reasoned cases, and is supported by the text-writers. In referring to this subject in 1 Black on Judgments, section 118, where the author to some extent reviews the cases, he says: "An obscure or ambiguous designation of the parties of the subject-matter in-

volved may be construed, as we have seen, with reference to the other parts of the record. And if the pleadings, or the verdict, show the actual amount of the recovery, without any doubt or room for mistake it would seem that the judgment should not be considered invalid, at least as between the parties, for its failure to specify the sum awarded with precision." The foregoing text is supported by the cases of *Carr v. Anderson*, 24 Miss. 188, and *Gutzwiller v. Crow*, 32 Minn. 70, 19 N. W. 344, in which the facts were similar to those in the case at bar. See, also, Freeman on Judgments, section 48. Any person of ordinary intelligence who should inspect the entry of the judgment in question would, we think, not have the slightest hesitancy or doubt with respect to arriving at the amount of the judgment. Should a writing or record which would be read and understood by all ordinary men in but one sense, nevertheless, be held to be uncertain by a court of justice because certain signs, marks, or words, usually used are wanting? It would seem that any writing or record that is certain to all ordinary minds should likewise be sufficiently certain in a court of justice. Common sense should not be lost sight of entirely merely because a court acts in conformity to certain rules of evidence. We are satisfied that, in view of the whole record and the manner in which the figures were written and pointed off, the amount of the judgment in question was no more uncertain than if the dollar sign or mark had in fact been used, or if the words "dollars" and "cents" had been written out in full after the figures. This assignment must therefore be overruled.

It is, however, further urged that respondent did not become the owner of said judgment until after he was served with notice of the assignment of the claim by Snow to appellant, and hence the judgment could not legally be set off against the Snow judgment. We cannot assent to this contention. The judgment was in fact always the property of respondent, and Mr. Hyde never had any beneficial interest in it. A judgment, under such circumstances, if there are no other valid obstacles in the way,

may be the subject of set-off. Referring to this subject, in 2 Black on Judgments, section 1003, the author says: "But it is also held that the use plaintiff—one to whose use a judgment has been obtained in the name of another—has an equitable right to use the judgment by way of set-off." Mr. Hyde certainly obtained the judgment for the use of respondent. This is not even questioned. But apart from this, the evidence is to the effect that the judgment obtained by Hyde was by parol transferred or assigned to respondent long before Snow assigned his claim to appellant. A 3 parol assignment of a judgment, in the absence of an express statute prohibiting it, is valid. (*Steele v. Thompson*, 62 Ala. 323; *Garvin v. Hall*, 83 Tex. 300, 18 S. W. 731; *Smith v. Peck*, 128 Cal. 527, 61 Pac. 77; 2 Black on Judgments, section 945; 23 Cyc. 1416, and cases cited in note 5.)

Respondent therefore, in either view, was the owner of the judgments in question which were made the subject of set-off. If there were no other legal obstacle in the way, the two judgments in favor of respondent and the one in favor of Snow which was conditionally assigned to appellant were, in our judgment, the subject of set-off. Whether mutual judgments should be set off and satisfied in that way, rather than by the ordinary method of enforcing them, rests largely within the discretion of the court to which the application is made. Under the modern rule courts of law may set off judgments where the right to do so is clear. Ordinarily, however, where there are different interests involved, the application should be made in equity, and the 4 matter should be controlled by equitable principles. (2 Black on Judgments, section 1000.) While in the case at bar it is disclosed that different parties were perhaps interested, who were not made parties, yet it also appears that the interests of those parties were inferior to those of respondent, and hence if any error was committed in not bringing all the parties who had an apparent interest in the Snow judgment before the court, the error is without prejudice. Moreover, there is no one complaining upon that score, and

hence the judgment of the district court, so far as 5
this appeal is concerned, cannot, for that reason, be
modified or reversed.

The following cases sustain our conclusion that, under the facts and circumstances, the judgments in question should be set off against each other *pro tanto*. (*Hendrickson v. Brown*, 39 N. J. Law, 239-243; *Hobbs v. Duff*, 23 Cal. 596; *McBride v. Fallon*, 65 Cal. 301, 4 Pac. 17; *Haskins v. Jordon*, 123 Cal. 157, 55 Pac. 786.) See, also, 2 Black on Judgments, sections 953, 954, 1000, and 1001, where the question is discussed and the cases on the subject are, in part, collated.

It is, however, contended that the judgments of respondent could not legally be set off against the Snow judgment because the latter judgment was, in legal effect, immune against set-off, for the reason that it represented property which was exempt from seizure and sale on execution. We have already pointed out that we held in *Snow v. West*, *supra*, that the property converted by the respondent, for which the Snow Judgment was obtained, was exempt. Section 3244, Comp. Laws 1907, reads as follows:

"Whenever any personal property exempt, as provided in this title, is levied upon, seized, or sold by virtue of an execution, or wrongfully and unlawfully taken or detained by any person, the damages sustained by the owner thereof by reason of such levy, seizure, or sale, or unlawful detention or taking, and any judgment recovered therefor, shall be exempt from execution."

The judgment therefore stood as representing the property, and if the property was exempt, the judgment was so. 6 This is generally held to be the law independent of statute, as the following cases demonstrate: *Collier v. Murphy*, 90 Tenn. 300, 16 S. W. 465, 25 Am. St. Rep. 698; *Pickrell v. Jerauld*, 1 Ind. App. 10, 27 N. E. 433, 50 Am. St. Rep. 192; *Millington v. Laurer*, 89 Iowa, 322, 56 N. W. 533, 48 Am. St. Rep. 389, and note; *Howard v. Tandy*, 79 Tex. 450, 15 S. W. 578; *Below v. Robbins*, 76 Wis. 600, 45 N. W. 416, 8 L. R. A. 467, 20 Am. St. Rep.

89; *Cullers v. May*, 81 Tex. 110, 16 S. W. 813; *Wylie v. Grundysen*, 51 Minn. 360, 53 N. W. 805, 19 L. R. A. 33, 38 Am. St. Rep. 509; *Junker v. Hustes*, 113 Ind. 524, 16 N. E. 197; *Cleveland v. McCanna*, 7 N. D. 455, 75 N. W. 908, 41 L. R. A. 852, 66 Am. St. Rep. 670; *Beckman v. Manlove*, 18 Cal. 389.

In view of our statute, however, the question is not open for discussion in this state. If Snow, or his assignee, the appellant, was still entitled to claim the judgment exempt when the court allowed and entered the judgment of set-off, it may well be that the court erred in entering said judgment. For the purposes of this decision we shall assume, without deciding, that the assignment of the claim from Snow to the appellant conferred upon him all the usual and ordinary rights of an assignee. By section 3247, which is in harmony with the law generally, it is provided that non-residents, or those who are about to depart from the state with the intention of becoming residents elsewhere, are not entitled to the benefits of our exemption laws. Snow left this state and ceased to be a resident thereof in January, 1905; the assignment of his claim to appellant was not made effective as against respondent until September, 1907, and the set-off of the judgments was not made until the 23d day of July, 1909. Snow therefore had forfeited his 7, 8 right to hold either the claim or judgment exempt before the assignment to appellant was made, and appellant thus acquired and can claim no rights Snow could not claim when the assignment was made, in so far as exemptions are concerned. This is clearly the logic of the cases of *Millington v. Laurer* and *Cullers v. May*, *supra*. In both of those cases claims that were exempt were assigned, and in both it is clearly intimated that the exemptions were held available to the assignees only because the assignments were for value, and were made at a time when the assignor had a right to enforce his exemption rights. Such is not the case here. Neither when the assignment nor when the set-off was made by the court could either Snow or appellant have enforced the exemption as against respondent. Moreover, the authori-

ties we have cited are clearly to the effect that appellant always held the claim assigned to him a subordinate to respondent's judgments, and unless he can claim the judgment based on said claim as exempt, his rights are inferior to those of respondent. From what we have said it follows that he cannot sustain such a claim. This is the view the district court entertained, and in view of the facts and circumstances, and the law, applicable thereto, we are of the opinion that the judgment of the court is right.

What we have said also disposes of all the other questions raised by appellant.

The judgment is therefore affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

ON APPLICATION FOR REHEARING.

FRICK, J.

Appellant has filed a petition for rehearing upon the ground that we have failed to consider a material question. In determining the case we were of the opinion that the question now urged by counsel was not involved, but in view of his strenuous insistence and in deference to his contention we have concluded to make a few observations upon his application for rehearing. In support of the application counsel insists that the result reached by us in the opinion filed is contrary to the equitable doctrine that in a court of justice no one will be permitted to benefit by his own wrong. The contention is now seriously made that inasmuch as appellant's judgment was obtained by reason of respondent's wrongful and unlawful acts in causing appellant's exempt books to be sold upon execution, and that appellant's judgment was for that reason also exempt, that therefore if respondent be permitted, as we have held, to set off the judgments he has obtained against appellant's judgment obtained as aforesaid, that respondent will be permitted to benefit by his own wrong. Numerous cases are cited in which it has

been held that where A by stelh, fraud or misrepresentation has induced B to come or go into a jurisdiction other than that of B's residence, and A thus obtains service of legal process upon B in the foreign jurisdiction, or where A by the means aforesaid obtains a judgment or other legal advantage over B, that the courts will not permit A to profit by his wrong, but will quash such service upon the application of B, or arrest the enforcement of a judgment thus obtained. That this doctrine is sound, wholesome and just and should be enforced in all proper cases no one can doubt, and it is well illustrated and applied in the following among other cases to which we have been referred by counsel: *Pomroy v. Parmlee*, 9 Iowa, 144, 74 Am. Dec. 328; *Chubbuck v. Cleveland*, 37 Minn. 466, 35 N. W. 362, 5 Am. St. Rep. 864; *Wood v. Wood*, 78 Ky. 624; *Dunlap v. Cody*, 31 Iowa, 260, 7 Am. Rep. 129; *Hill v. Goodrich*, 32 Conn. 588; *Cavanagh v. Manhattan Tr. Co.* (C. C.), 133 Fed. 818; *Olson v. McConihe*, 54 Misc. Rep. 48, 105 N. Y. Supp. 386.

The counsel who makes the application frankly admits that he has found no case where the facts were as in the case at bar. Neither have we, and neither the doctrine invoked by counsel nor the cases cited by him, in our judgment, can have any application in this case.

It is not questioned that respondent's judgments were based upon just claims, and that they were legally and properly obtained. True it is that appellant's judgment was based upon the wrongful and unlawful acts of respondent in causing exempt property to be levied on and sold. The judgment that respondent obtained represented the exempt property, and for that reason was likewise exempt. But the judgment which in contemplation of law is property, lost its exempt character and ceased to be immune from legal attack by reason of the non-residence of appellant long before the district court allowed respondent's judgments to be set off against appellant's judgment. Suppose appellant had ceased to be a resident of this state and had left his books here, would any one question the right of any creditor to seize his books by legal process and sell them, and apply the proceeds

thereof to the satisfaction of a judgment upon which such process had duly issued? After appellant had ceased to be a resident of this state his books ceased to be immune against levy and sale. They then lost their exempt character. No one would be bold enough to contend, we think, that because the books at one time were exempt, that for that reason they always continued to be so notwithstanding the fact that the conditions upon which their exempt character was based no longer existed. What is true of the books is true with respect to appellant's judgment. When the books ceased to be exempt they could be seized on execution and sold, and when the judgment ceased to be exempt it too could be made available by appellant's creditors, and they could reach it by any process known to the law, and one way to reach such a judgment was by way of setting off the judgments appellant's creditors had against the judgment he had against them. As it would have been neither wrongful nor unlawful to have seized the books on execution after appellant had lost his right to claim them as exempt, it likewise could not be wrongful for respondent to ask that his judgments against appellant be offset against the judgment appellant had against respondent. It is manifest therefore that the doctrine contended for by counsel can have no application to the facts of this case. This being so, and no good reason appearing why a rehearing should be granted, it ought to be, and accordingly is, denied.

STRAUP, C. J., and McCARTY, J., concur.

ROLAPP v. OGDEN & NORTHWESTERN RAILROAD COMPANY et al.

No. 2116. Decided June 3, 1910. On Application for Rehearing, August 1, 1910 (110 Pac. 364).

1. **CORPORATIONS—ISSUE OF STOCK—CONSIDERATION.** Const., art. 12, sec. 5, provides that corporations shall not issue stock, except to bona fide subscribers therefor, or their assignee, or issue any obligation for payment of money, except for money or property received, or labor done, and that all fictitious increase of stock, or indebtedness, shall be void. Section 11 provides that no corporation shall issue stock or bonds, except for money paid, labor done, or property actually received. Comp. Laws 1907, sec. 316, provides that property may be received in payment for stock, but if so, it must be described in the articles of incorporation, and its fair cash value stated, which statement, except for corporations created for mining and irrigation, must be supplemented by affidavit that the property is reasonably worth the amount in cash stated, for which it is received. Section 432, relating exclusively to railroads, provides that a certificate of incorporation shall not be issued to any railroad company until it appears by affidavit that one thousand dollars for each mile of the proposed railroad has been subscribed, and that ten per cent of the amount subscribed by each subscriber has been paid. Section 331 provides that the property of a corporation and the unpaid capital stock shall be liable for the debts of the corporation. *Held*, that the capital stock of corporations, except those created for mining and irrigation, must represent full actual value, either in money or property, and the subscribers for stock must pay one hundred cents on the dollar, or its equivalent, for their stock, and until so paid they are liable to creditors of the corporation for any balance remaining unpaid on their subscriptions. (Page 554.)
2. **CORPORATIONS—ISSUE OF BONDS—"FICTITIOUS INCREASE OF INDEBTEDNESS."** Const., art. 12, sec. 11, provides that no corporation shall issue stock or bonds, except for money paid or labor done, or property actually received, and that all fictitious increase of stock or indebtedness shall be void. *Held*, that a corporation cannot issue bonds as a bonus to subscribers to the capital stock, and where subscribers to the stock of a corporation paid for the amount of stock issued to them, so that they were entitled to fully paid stock, bonds of the corporation issued to them in addition to the stock were void, as against creditors while in the hands of stockholders, not purchasers for value and without notice; they being a "fictitious increase of indebtedness" within the Constitution, even though they were issued and delivered as security for additional

money advanced by the subscribers as a loan, either to or for the benefit of the corporation before issuance of the bonds, or though such sum advanced became a part of the consideration for the bonds, such advance amounting to only one-fourth of the amount of bonds issued, and as against the corporation they could not be enforced for any amount in excess of what the corporation received for them from the stockholders.¹ (Page 558.)

3. **CORPORATIONS—SUBSCRIPTION TO STOCK—APPLICATION.** Any arrangement by which the subscriptions of stockholders to the stock in a corporation are diverted from their natural and legal purpose as a fund for benefit of creditors of the corporation is void, as against public policy. (Page 559.)
4. **CREDITORS' SUIT—RIGHT TO REMEDY.** Ordinarily, a judgment creditor before he can invoke equity in aid of his judgment must allege and prove that he has exhausted his legal remedies, but such facts need not always be directly proved or alleged, but may be done by inference. (Page 559.)

ON APPLICATION FOR REHEARING.

5. **CORPORATIONS—"FICTITIOUS INCREASE OF INDEBTEDNESS"—CONSTITUTIONAL PROVISIONS:** Under Const. art. 12, sec. 5, providing that all "fictitious increase of stock or indebtedness" of a corporation shall be void, indebtedness incurred for less than full consideration is fictitious, and that some consideration is paid does not relieve the indebtedness from such character. (Page 562.)

Appeal by Emil S. Rolapp, trustee, against the Ogden & Northwestern Railroad Company and others.

From the judgment the plaintiff appeals.

REVERSED WITH DIRECTIONS.

Richards, Davis & Boyd for appellant.

J. N. Kimball and *Halverson & Pratt* for respondents.

APPELLANT'S POINTS.

Did the court err in overruling the demurrer of the plaintiff to the affirmative answer of defendant Smith? Or, in other words, was the court authorized to give defendant Smith the relief given under it, or under the first part of his answer?

¹Crofoot v. Thatcher, 19 Utah, 212, 57 Pac. 171, 75 Am. St. Rep. 725.

The answer upon which he relies alleges conclusions merely and no specific facts and, hence, is insufficient to put the plaintiff upon a defense thereto and all evidence under it was erroneous. That fraud must be specifically pleaded has been repeatedly established by this court. (*Vorhees v. Fisher*, 9 Utah, 303, at p. 306; *Selz v. Tucker*, 10 Utah, 132, at p. 134; *Wilson v. Sullivan*, 17 Utah, 341, at p. 349, 350; *Claf-lin v. Simon*, 18 Utah, 153, at p. 158-9; *Bank v. Little*, 13 Utah, 265, at p. 274; *Vorhees v. Bonesteel*, 83 U. S. 16, 21 L. Ed. 268 and cases cited.)

Could defendant Smith as a subsequent creditor attack the validity of the trust deed or bonds, either as to lack of consideration or fraud?

That he was a subsequent creditor clearly appears from the pleadings and from his answer. He admits the existence and recording of the trust deed in issue on February 20, 1904 (par. 4, Ab. 51), and alleges his own judgment as of January and April, 1908 (Ab. 54). Then could he attack the conveyance or bonds? The authorities are to the contrary. They hold that subsequent creditors have no more interest in prior conveyances than the debtor has made than have subsequent purchasers as to prior conveyances. (*Toledo Co. v. Continental Co.*, 36 C. C. A. 155, at p. 187; *Graham v. Railroad Co.*, 102 U. S. 148, 26 L. Ed. 106; approved in *Hollins v. Brierfield Co.*, 150 U. S. 371, 37 L. Ed. 1113, at p. 1116; *Porter v. Steel*, 120 U. S. 673; *Schmidt v. Dahl*, 93 N. W. 665, at p. 668 [Minn].)

Even if defendant Smith's judgments were prior in time to the trust deed, can he attack it under the answer?

The cases go even further than those we have cited above and hold that, even if the creditor be, in fact, prior he must show certain facts or that he has done certain acts before he can attack the validity of an incumbrance like this. Before he can attack a prior incumbrance or mortgage he must have secured a judgment, with execution and return of *nulla bona* or similar process. In other words he cannot attack it until he has exhausted his legal remedy; and he must show in his pleadings for relief against such prior incumbrance, by prop-

er allegations, upon the ground of fraud or otherwise, that he has exhausted such legal remedy before he can ask for equitable relief. (*Thompson v. Van Vechten*, 27 N. Y. 568, 582; *Chandler v. Colcord*, 32 Pac. 330, at p. 335 [Okla.]; *Sullivan v. Miller*, 13 N. E. 772, at p. 774 [N. Y.]; *Tolbert v. Chandler*, 18 N. W. 647, at p. 648 [Minn.].)

RESPONDENT'S POINTS.

The averments in Smith's answer are undoubtedly sufficient under the following authorities: (*Bull v. Ford*, 4 P. 1175; *Thelkel v. Scott*, 34 P. 851; *Hager v. Shindlar*, 29 Cal. 60; *In Re Patton*, 42 P. 459.)

In the case at bar, no consideration was given, and the act of the board of directors was *ultra vires* and void, and Smith had a right to show the mortgage was a nullity regardless as to whether he was an existing or subsequent creditor. But it has always been held that that a subsequent creditor could attack a voluntary conveyance where it was executed with intent to deprive future creditors of the means of enforcing the collection of their debts. It was said in *Burdick v. Gill*, 7 Fed. 668: "The well settled rule is that where a conveyance is intentionally made to defraud creditors, it is void as to all subsequent as well as prior creditors," and it is certainly within the rule to say that if the conveyance is made with a view to defrauding subsequent creditors, it is, as to them, void, although all prior creditors are paid in full. Citing: (Story Eq. Juris, 362 *et seq.*; Bump on Fraudulent Conveyances, 311; *Sexton v. Wheaton*, 8 Wheat, 229; Kerr on Fraud and Mistake, 206, 207; 1 Am. Lead. Cases, Hare & Wallace's notes (5 Ed.), 42 and cases cited in note 2-xx.)

If a person, when about to contract debts, makes a voluntary conveyance, with actual intent to deprive his future creditors of the means of enforcing collections of their debts, and this purpose is accomplished, it is very clear that such subsequent creditors are injured and defrauded. (*Burdick v. Gill*, 7 Fed. 668; *Crawford v. Beard*, 8 P.

537; *Spuck v. Logan*, 99 Am. St. Rep. 427; *Huggins v. Perrine*, 68 Am. Dec. 131; *Brundage v. Cheneworth*, 63 Am. St. Rep. 382; *Hagerman v. Buchanan*, 14 Am. St. Rep. 732; *Winchester v. Charter*, 12 Allen, 606; Bump on Fraudulent Conveyances (2 Ed.), 319; 24 Cent. Dig., Secs. 14-15; Cols. 28-30.)

It is not necessary, under the authorities, that the conveyance should be made with actual intent to hinder, delay or defraud creditors. "Fraud is established in such a case by inference or presumption. It may be inferred or presumed from the nature and character of the transaction itself or from facts or circumstances connected with it. If the necessary result of the act is to place the debtors property beyond the reach of legal process, so as to delay creditors, it will be presumed it was done with fraudulent intent." (*Crawford v. Beard*, 8 P. 541; *Cutcheon v. Buchanan*, 50 N. W. 756 [Mich.] See *Gustin v. Matthews*, 25 Utah 168.)

FRICK, J.

On March 13, 1908, appellant, as trustee, began this action in the district court of Weber County, Utah, to foreclose two mortgages in the form of trust deeds, which, it was alleged, were executed and delivered to the trustee by the Ogden & Northwestern Railroad Company, a corporation, hereinafter styled Railroad Company, to secure the payment of certain bonds issued by said company. The first one of the trust deeds was dated February 20, 1904, and was given to secure eighty bonds of five hundred dollars each, which were dated January 1, 1904, made payable in twenty years from date with five per cent. interest, payable semi-annually on the first days of July and January of each year, interest payments to begin with July 1, 1904. The second trust deed bore date September 15, 1904, and was executed and delivered by said Railroad Company to the trustee to secure forty bonds of five hundred dollars each, dated January 1, 1904, payable in twenty years from date with five per cent. interest, payable semi-annually on the first days of July and January of each

year, interest payments to begin on July 1, 1905. The complaint is in the usual form in foreclosure proceedings and conforms to the statute of this state, and each set of bonds, and the trust deeds securing the same, are set forth in separate causes of action in the complaint.

The property that was included within the trust deeds is in each of said deeds described as follows: "All of the real estate and buildings of the Ogden & Northwestern Railroad Company, all tracks, rails laid, sidings, turnouts, bridges, depots and stations, cars, motors, engines, and other stock and equipment, snowplows, tools, implements, easements and privileges, materials on hand, furniture, and fixtures, all franchises and rights of way, and all personal property used in connection with the said line of railway, now owned or hereafter acquired, used on the present mileage by this company, and to be used in connection with said line of railroad, being located in the counties of Weber and Box Elder, state of Utah."

The only parties who were made defendants to the action when it was commenced were the railroad company aforesaid and one A. R. C. Smith, who, it was alleged, claimed "some interest or lien upon the aforesaid mortgaged property." Mr. Smith died after he had filed his answer, and the executors of his last will and testament were substituted as defendants. We shall treat the case as if Mr. Smith were defending in person.

Mr. Smith, in his answer, after various admissions and denials, affirmatively averred that he, on January 30 and April 22, 1908, obtained judgments against said company in the district court of Weber County, Utah, amounting in the aggregate to \$3781.25, which were wholly unpaid; that said judgments (one for costs and the other for damages) were obtained in one action instituted against said company by said Smith to recover damages for the destruction of his property by fire negligently set by the Railroad Company. We remark that the property was destroyed, and said action was commenced several years after the bonds and trust deeds

in question were executed and delivered. Mr. Smith also averred that the trust deeds set forth in the complaint were made and delivered "without any consideration moving to his codefendant from the plaintiff or any other person." He further averred as follows: "He further alleges upon information and belief that said mortgages were recorded by his said co-defendant with the purpose and intent to hinder, delay, and defraud any and all creditors that it might thereafter have, and he further, upon his information and belief, alleges: That said mortgages were delivered to the plaintiff as aforesaid, and accepted by him, with the purpose and intent of hindering, delaying, and defrauding this defendant, and preventing him from enforcing the collection of his said judgments." Mr. Smith also denied that the trust deeds were ever delivered to the trustee. There was a special demurrer interposed to the answer, but this demurrer did not in any way refer to or assail any of the matters affirmatively pleaded, and hence is of no importance now.

At the hearing the court found the issues against the appellant on the first cause of action and held the first issue of bonds and trust deed void as against the judgments of Mr. Smith on various grounds, but valid as against the company. The second issue of bonds and trust deed the court held valid, and also held them to be a prior superior lien on the mortgaged property, as against Mr. Smith's judgments. The court entered a decree of foreclosure, ordered the mortgaged property sold and the proceeds applied as follows: (1) To pay the amount found to be due on the second trust deed; (2) to pay the amount found due on the judgments of Mr. Smith, and (3) the remainder to be paid to appellant as trustee under the first deed. The trustee alone appeals.

Some of the findings of fact are vigorously assailed. It is also contended that the allegations of the answer were insufficient in some particulars to authorize the relief granted by the court. The pleadings and findings are very voluminous, covering over eighty pages of the printed abstract. It is impracticable to set any of them forth even in condensed form, and we shall not attempt to do so. Moreover, the view

we take of the whole case makes it unnecessary for us to make an extended statement of the evidence adduced at the hearing.

We shall therefore confine ourselves to a statement of what we deem to be the material and controlling facts, as we have determined them from a careful reading of the evidence contained in the original bill of exceptions, from which it is made to appear that in June, 1901, one William A. Paxton, of Omaha, Neb., as the owner, by proper deed conveyed to David Eccles, of Ogden, Utah, certain lands specifically described in said deed, and on which lands were situated what was commonly known as the Ogden Hot Springs, all of which, together with the improvements surrounding them, as well as the line of railroad between Ogden City and said springs, and all property of every kind and description, including all franchises and rights of all kinds connected with said springs and railroad, were conveyed by said deed to said Eccles for the sum of \$20,000, which sum was then and there paid by said Eccles to said Paxton for all of said property, rights, and franchises. At or about the time said property was purchased and paid for by said Eccles, he and a number of certain individuals, whom we shall refer to hereafter, entered into an agreement among themselves whereby it was agreed that the railroad property aforesaid should be segregated from the springs property and should be incorporated, and that each one of said individuals then agreed to and did contribute a certain amount to a fund which was to be used to repay Mr. Eccles for the amount he had paid to Mr. Paxton for all of the property. Mr. Eccles himself agreed to and did contribute to this fund. It was also understood that each person who had contributed to the fund aforesaid should receive stock in the railroad corporation which was to be formed, in the amount that he had contributed to said fund. In other words, the railroad property was to be conveyed by Mr. Eccles to the corporation when organized as payment in full for two hundred shares of one hundred dollars each of its capital stock, and each one of the persons aforesaid was to receive one share of said stock for each one hundred dol-

lars that he had contributed to the fund aforesaid. It was also agreed that when said corporation should be organized it should issue bonds to the amount of \$40,000 and each one who had contributed to said fund, in addition to his stock, should receive two dollars in bonds for every dollar that he had paid into the fund as aforesaid. The payments to said fund were made during the summer of 1901, and Mr. Eccles was repaid the amount he had paid Mr. Paxton, less the amount he himself had agreed to contribute to the fund aforesaid. Considerable time elapsed before the contemplated corporation was finally organized. When it was organized its authorized capital stock was limited to \$200,000, which was divided into 2000 shares of \$100 each. Of this amount \$20,000, or ten per cent. thereof, was paid up by the persons above mentioned in the manner aforesaid and for which each one received one share of stock for every one hundred dollars he had contributed as stated. On January 1, 1904, the corporation issued bonds to the amount of \$40,000. These bonds were issued in denominations of \$500 each, and provided for interest and were payable as hereinbefore stated, and were given as a bonus to the persons aforesaid in the proportion of two bonds for every five shares of capital stock which were held by each of them.

There is some controversy between counsel with respect to what constituted the actual consideration for the bonds delivered as aforesaid. In our judgment this matter is put beyond dispute by Mr. Kircher, the secretary of the corporation, who, although an adverse witness in the case, testified upon this point as appears in the original bill of exceptions, as follows: "Q. Now, as a matter of fact, you paid for your stock by having Mr. Eccles transfer the railroad property to the company, didn't you? A. I suppose practically so, yes; it is just simply a question of not issuing the stock at the time when we put up our money. We were not incorporated at that time. Q. And on your ledger and cashbook you have the sales of these bonds dating away back to 1902? A. The bonds were not issued at that time; they show on their face they were not issued until January, 1904; they were paid for,

but they were not issued or delivered until January, 1904. Q. But you carried them on your cashbook as having been sold in 1902? A. Sure. I couldn't carry them any other way. It was understood we were going to bond the road for that amount. . . . Q. It was a fictitious account up to 1904? A. Not as long as it was thoroughly understood we were going to bond; it was just simply a delay in getting the bonds printed and getting them up."

This same witness also testified that when the corporation was organized and the ten per cent. of stock issued, he received five shares and \$1000 of bonds of the first issue for the \$500 he had contributed to the fund which was applied to repay Mr. Eccles for what he had advanced in purchasing the railroad property and the springs aforesaid. Two other witnesses who were contributors to the fund aforesaid also testified in the case. Mr. James Pingree, who acted as agent for the purchaser in obtaining the property from Mr. Paxton, and who contributed \$2000 to the special fund and received \$2000 of the capital stock of the railroad company, when asked with respect to the \$40,000 issue of bonds, in response to the following questions, testified as follows: "Q. That first issue of bonds. What became of them, if you know? A. I received bonds for the amount I paid in; I suppose the others did the same. Q. You received bonds, yourself, for the amount you subscribed? A. Yes, sir. Q. And you subscribed \$2000? A. Yes, sir. Q. And before that time you had paid Mr. Eccles the \$2000? A. The \$2000 was paid and afterwards given to Mr. Eccles. I did not pay it directly to him."

Mr. Volker, another one of the original subscribers for railroad stock, and who contributed to the special fund to pay for the property, when asked with respect to how he obtained his proportion of the \$40,000 bond issue, in answer to the following questions, said: "Q. Mr. Volker, at the time you paid your subscription, did you receive any bonds of the railroad company? A. Yes, sir. Q. Now, how much in amount? A. If I recollect, two bonds. Q. Two

bonds of \$500 each? A. Yes, sir. Q. That was double the amount of your subscription, wasn't it? A. Yes, sir."

Mr. Kircher, Mr. Pingree, and Mr. Volker were the only ones of the subscribers who testified, and, as appears from the testimony, they all received precisely two dollars in bonds for every dollar of stock subscribed for by them. It is true that each one of the subscribers afterwards was assessed ten per cent. of the amount of his subscription, which was paid, and that they subsequently also paid additional sums, so that their payments amounted to an additional \$10,000, which will hereafter be more specially referred to.

From the testimony we have quoted above it is clear, we think, that the bonds were primarily issued and delivered to the subscribers to secure the amount of their subscriptions. That the recipients of the bonds may also have intended that the bonds should evidence the additional payments may perhaps be true, but this was merely incidental and had nothing to do with the original plan of issue, as appears from the testimony we have quoted. The second issue of \$20,000, it appears, was purchased by the subscribers at fifty per cent. of their face value, but with this issue we are not concerned now.

The names of the subscribers for railroad stock, and the amount each subscribed, are as follows:

David Eccles	\$ 9,000 00
Thomas D. Dee	2,000 00
H. H. Spencer	2,000 00
E. M. Allison, Jr.	500 00
W. J. Shealy	500 00
R. S. Joyce	500 00
James Pingree	2,000 00
N. C. Flygare	500 00
J. W. F. Volker	500 00
C. W. Nibley	1,000 00
William Eccles	1,000 00
C. H. Kircher	500 00
Total	<u>\$20,000 00</u>

In the articles incorporating the railroad company the exact number of shares that were paid for as indicated above were issued, but the distribution thereof was not quite in the same order or proportion, as appears from article 7, in which the shares are distributed as follows:

David Eccles	\$ 4,000 00	40 shares
Thomas D. Dee	5,000 00	50 shares
H. H. Spencer	5,000 00	50 shares
E. M. Allison, Jr.....	500 00	5 shares
W. J. Shealy	500 00	5 shares
R. S. Joyce	500 00	5 shares
James Pingree	2,000 00	20 shares
N. C. Flygare	500 00	5 shares
J. W. F. Volker	500 00	5 shares
William Eccles	1,000 00	10 shares
C. H. Kircher	500 00	5 shares

Total \$20,000 00 200 shares

It will be noticed that David Eccles reduced his amount from \$9000 to \$4000, Thomas D. Dee and H. H. Spencer increased theirs from \$2000 to \$5000 each, and C. W. Nibley, with \$1000, dropped out altogether. These changes and transfers were evidently made between the time the money was originally paid and the time when the stock was issued and the bonds distributed. It is also made to appear that the subscribers for the stock aforesaid received the whole of the \$40,000 bonds issued January 1, 1904, in the proportion we have already stated.

It is strenuously insisted that the consideration for the first issue of bonds was by the subscribers paid in money as follows: That after the original agreement was entered into and the \$20,000 subscription had been paid pursuant thereto, the subscribers, by way of an assesment, paid the further sum of \$10,000 as a loan to or for the benefit of the Railroad Company, all of which was paid before the bonds were issued and delivered. From this it is claimed that the bonds were in fact issued and delivered as evidence of the said indebted-

ness and to secure the same. There is some evidence in the record that the subscribers paid the \$10,000 as stated, but that the bonds were originally delivered as security therefor may well be doubted. Indeed, when the transactions are viewed in the light of the documentary evidence, there is little room for doubt that the bonds were agreed to be and were in fact delivered to the subscribers as a bonus. In this connection it should not be overlooked that each subscriber received just double the amount of bonds that he subscribed for stock, and this too, regardless of the amount he subsequently paid on the \$10,000 assessment. This fact squares precisely with the manner in which the bonds were distributed, as already stated. From the testimony we have set forth, and from the manner the distribution on the first issue of bonds was made, we are convinced that the claim that the \$40,000 bonds were issued and delivered to secure the \$10,000 paid in on the assessment is a mere afterthought. True, in one sense, it may perhaps be conceded that the bonds might be taken as evidencing the \$10,000, but in our judgment, when the idea of issuing bonds was originally conceived, and when the original agreement was entered into, the bonds were not intended to secure anything except the money advanced by the subscribers in payment for the property purchased from Mr. Paxton. It might as well be claimed that the second issue of bonds for \$20,000 was intended to secure the \$10,000 assessment. It is also to be remembered that it was about the time the Railroad Company was organized and the railroad property and franchises were conveyed to it another corporation was organized by the same individuals who had subscribed for the railroad stock. The latter corporation had a capital stock of \$20,000, all of which was paid up by conveying to it the Ogden Hot Springs property which had been purchased from Mr. Paxton with the railroad property, which latter had already been conveyed to the Railroad Company as aforesaid. We thus have \$20,000 worth of stock paid for in the Railroad Company and a like amount in the Ogden Hot Springs Company with property which was purchased for \$20,000. In

other words, stock of the face value of \$40,000 was paid for with property purchased for \$20,000, unless we allow the \$10,000, which was paid as an assessment by the subscribers to railroad stock, to figure in the deal. We think a fair inference from all the evidence, oral and documentary, is to the effect that the \$20,000 paid for the property purchased from Mr. Paxton, together with the \$10,000 paid as a so-called assessment, in fact constituted payment for \$40,000 of paid-up stock which was issued to the subscribers of both corporations, and that the \$40,000 bonds were intended and were in fact issued and delivered as a bonus to the subscribers as aforesaid. The claim that those interested in the Railroad Company after the bonds were issued made further payments of money to or for the use of said company is entirely foreign to the legal questions involved and may therefore be eliminated from further consideration.

The principal question to be solved therefore is whether the \$40,000 bonds which were issued and delivered to the original subscribers of the stock of the Railroad Company, as hereinbefore stated, can be enforced as against corporate creditors. Section 5 of article 12 of the Constitution of this state, so far as material here, reads as follows:

"Corporations shall not issue stock, except to bona fide subscribers thereof or their assignee, nor shall any corporation issue any bond, or other obligation for the payment of money, except for money or property received, or labor done. . . . All fictitious increase of stock or indebtedness shall be void."

It will be noted that the Constitution is silent with regard to how stock may be paid for. Section 316, Comp. Laws Utah, 1907, which forms a part of the general law on the subject of corporations, provides that property may be received in payment for stock, but if this is done the property so received must be described in the articles of incorporation and its fair cash value must be stated, which statement, except for corporations created for mining and irrigation must be supplemented by the affidavit of three persons acquainted with the property, who must state that the property is

reasonably worth "the amount in cash" stated in the articles of incorporation, and for which it is received by the corporation. In section 432, which exclusively relates to railroad corporations, it is in substance, provided that a certificate of incorporation shall not be issued to any railroad company until it shall be made to appear by the affidavit of at least three of the incorporators that \$1000 for each mile of the proposed railroad has been subscribed, and that ten per cent. of the amount subscribed by each subscriber has been paid. Again, in section 331, which is the section fixing the liability of stockholders, it is provided that "the property of the corporation and the unpaid capital stock shall be liable for the debts of the corporation." The holder of "full-paid" stock is, however, discharged from all liability for corporate debts. Section 11 of article 12 of the Constitution of California relating to the matter now under consideration, reads as follows: "No corporation shall issue stock or bonds, except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness shall be void." We shall refer to this provision again later.

If we keep in mind all of our own constitutional and statutory provisions, we think it is manifest that it was the intention both of the people who adopted the Constitution and the Legislature who passed the foregoing sections that the capital stock of corporations excepting those created for mining and irrigation, shall represent full actual value, either in money or property, and further that the subscribers for stock shall pay one hundred cents on the dollar, or 1 its equivalent, for the stock subscribed for by them, and until so paid that they are liable to creditors of the corporation in a proper proceeding for any balance remaining unpaid on their subscriptions. No doubt when stock is once "full-paid," whether in money, property, or labor, it may be bought and sold at any price, but commercial or business corporations in this state may not issue stock to their subscribers for less than the face value thereof, which must be paid for, either in money or property. If, therefore, stock

is issued to subscribers for less, it is not "full-paid" stock within the purview of the statute, and a subscriber would be liable for any unpaid balance as aforesaid.

Under the Constitution corporate bonds, or other obligations for the payment of money, may not be issued, except for money, or its equivalent in property or labor. To issue bonds as a bonus to subscribers to the capital stock of corporations of this state is therefore forbidden by the organic law. In view of the foregoing what is the status of the \$40,000 bonds which were issued and delivered to the original subscribers for the capital stock of the Railroad Company? When the corporate subscribers thus paid in the first \$20,000 they simply paid for the amount of stock issued to them and were thus entitled to "full-paid" stock for that amount, but were not entitled to anything else. The bonds that were given to them thus were a mere gratuity, unless it can truthfully be said that the bonds were issued and delivered as security for the additional \$10,000 which the subscribers had advanced as a loan either to or for the benefit of the railroad company before the first issue of bonds was actually delivered to them. While it is but natural that such a contention should now be put forth, yet from the testimony which we have quoted, and which comes from the subscribers themselves, and for the reasons we have already advanced, such a contention seems entirely untenable. But if for argument's sake we should assume that the first issue of bonds was delivered as security for the \$10,000, then the bonds would still be in conflict with the organic law of this state. To deliver \$40,000 of bonds for \$10,000 makes the bonds fictitious to the extent of seventy-five cents on every dollar. Such bonds in the hands of the original stockholders could not be sustained, because directly contrary to the letter of the Constitution. Nor, from a legal point of view at least, does it help the matter any if it be said that the \$40,000 bonds were in fact delivered to secure both the \$20,000 paid for the two hundred shares of stock and the additional \$10,000 paid afterwards. So far as the payment for stock is concerned, that was a payment by the subscribers to the

corporation for stock and in no sense a loan from them to it and the law would not permit such a payment to be converted into a loan nor repaid by the corporation to the subscribers, either directly or indirectly. (*Sawyer v. Hoag*, 17 Wall. [U. S.] 610, 21 L. Ed. 731.) The principle discussed and applied in the foregoing case is approved in *Crowfoot v. Thatcher*, 19 Utah 212, 57 Pac. 171, 75 Am. St. Rep. 725. The \$20,000 therefore cannot legally form any part of the consideration for the \$40,000 issue of bonds.

As we have already stated, we think the inference is palpable that the first issue of bonds, amounting to \$40,000, was issued and delivered as a bonus to the subscribers. By this method, the subscribers for the \$20,000 were thus not only given a promise in writing that their subscriptions would ultimately be repaid to them, but, in addition to this, an attempt was made to secure them an annual income of ten per cent, on the \$20,000 actually paid in, in the form of five per cent. interest on \$40,000 of bonds issued to them. Any arrangement by which the subscriptions of the stockholders are diverted from their natural and legal purpose as a fund for the benefit of the creditors of the corporation is against public policy and void. This principle is well and clearly stated by Mr. Justice Lurton in the case of *Morrow v. Iron, etc., Co.*, 87 Tenn. 262, 10 S. W. 495, 3 L. R. A. 37, 10 Am. St. Rep. 658, by the following statement:

"The scheme proposed, upon which this corporation was to be organized, fixed the capital stock at \$350,000. The public has a right to presume that this stock has been, in good faith, subscribed, and that it will be paid. They have also the right to presume that the fund thus subscribed and paid in will, in good faith, be held and preserved as a capital and basis of credit and confidence. This much is held out to the public by the representation that its capital stock is \$350,000. But running along with this proposition that there shall be a capital stock of \$350,000 is the additional stipulation that the property of the company, which is to be procured by means of this capital stock, is to be mortgaged to secure bonds in amount precisely equal to the whole capital stock, and these bonds, instead of being sold for their market value and the proceeds applied to corporate uses, are to be divided out among the stockholders. Says complainant in his bill: 'Every subscriber was to have bonds and also stock of the company each to the amount of the subscription.' The result of this scheme, if it had been carried out

would have been that each subscriber would have received the obligation of the company to repay to him, with interest, his contribution to the capital stock of the company, and this obligation would have been secured by a first mortgage upon all the company's property. It was an agreement whereby the franchise was to be secured, and at the same time deprive the public of the security which by law they are entitled to have, and upon which the grant of the franchise depends. Whatever the real motive and purpose of the promoters of this arrangement may have been, its legal effect, if valid, would have been to have thrown all the risks and hazards of the business upon the public who should deal with it, while the contributors were to reap all possible gains, and should be secured against loss in the event the enterprise proved unprofitable. Is a contract by which a corporation agrees to repay to the contributors of its capital stock their several contributions, and whereby such contributions are converted into corporate debts, valid even as against the corporation? Upon what consideration does such an agreement rest and what power has a corporation to bind itself by such a contract?

Counsel for appellant seek to distinguish the case at bar from the one just quoted from upon the ground that in that case the bonds were delivered as a bonus, or as a mere gratuity to the subscribers, while in this case it is contended that the \$40,000 bonds actually secured advances of money made by the subscribers to the corporation in the amount of at least \$10,000. But, as we have seen, this was neither the actual agreement nor intention of the parties in interest, and when the distribution of the bonds was made it was not made upon any such basis. But if, for the sake of argument, we again concede that the \$10,000 paid by the subscribers after the first agreement to incorporate and before the bonds were actually distributed, became a part consideration for the bonds, yet the whole transaction is tainted with at least two vices, one of which was the attempt to secure and repay to the subscribers their original subscriptions, and the other to issue corporate bonds to stockholders for much less than the face value of the bonds, which is forbidden by the Constitution. Being thus tainted we think that as against creditors of the corporation such bonds, while in the hands of stockholders who are not purchasers for value and without notice, are of no force or effect, and that as against the corporation they cannot be enforced for any amount in excess of what the

corporation received for them from the stockholders. We think that any amount in excess of what was actually received by the corporation from the stockholders either in money or its equivalent for bonds, so long as they have not passed into the hands of innocent holders 2 for value and without notice, is, in the language of the Constitution, "a fictitious issue of indebtedness," and is therefore void.

As we have pointed out, the Constitution of California contains a similar provision. The only difference is that the language with respect to the receipt of money or its equivalent in the California Constitution applies to corporate stock as well as to corporate bonds, while in ours it is made to apply to bonds and other obligations for the payment of money. The provisions with regard to what constitutes full payment for stock has been frequently under consideration by the Supreme Court of California, as appears from a review of the cases found in the case of *Vermont, etc., Co. v. Decluz, etc., Co.*, 135 Cal. 579, 67 Pac. 1057. The Supreme Court of that state, after considerable waivering in the case last cited arrived at the conclusion that the constitutional provision means that a corporation cannot legally dispose of its stock for less than par paid in money or its equivalent in property or labor. If this be the correct construction of the provision, and we think it is, then it necessarily follows that what we have said with regard to what a corporation of this state is authorized to receive for its bonds, at least as between it and its stockholders, must be the par or face value thereof paid in money or its equivalent in either property or labor.

The Constitution of Alabama contains a provision similar to ours, and the Supreme Court of that state has repeatedly held that corporate bonds cannot legally be issued to stockholders, at least, for less than the face or par value thereof, to be paid either in money or its equivalent. (*American, etc., Co. v. Crane*, 142 Ala. 620, 39 South. 233; *Roman v. Dimmick*, 115 Ala. 233, 22 South. 109.) See, also, *Farmers' Loan & Trust Co. v. San Diego St. Car. Co.* (C. C.),

45 Fed. 528, where the doctrine is clearly stated that under constitution and statutory provisions like ours neither corporate stock nor bonds can legally be issued, except for the face or par value paid for in money or its equivalent.

We have cited the foregoing cases for the sole purpose of illustrating the principle that corporate bonds may not, as against corporate creditors, be legally issued and delivered to subscribers under the circumstances disclosed by the record in this case. The question of selling or negotiating corporate bonds to strangers, or what the rights of innocent purchasers may be, is not involved in this case, and hence we express no opinion with respect thereto. 3

It is, however, strenuously contended by the appellant that the allegations of Mr. Smith's answer were insufficient to entitle him to assail the bonds in question. In this connection it is, in effect, contended that unless Mr. Smith was injured or affected in his rights to collect his judgments he could not attack the bonds as a mere creditor of the corporation, and that he has not alleged or proved that he is so affected or injured. It is undoubtedly the law that, as a general rule, a judgment creditor, before he can invoke the aid of a court of equity in aid of his judgment, must allege and prove that he has exhausted his legal remedies. But the facts need not always be directly proved or alleged. This may be, and often is, done by inference. This principle is well illustrated by Chancellor Williamson in the case of *Dunham v. Cox*, 10 N. J. Eq. 437, 64 Am. Dec. 460, and in the case cited in the note to the case of *Massey v. Gorton*, 90 Am. Dec. 289. If all the allegations contained in both the complaint and the answer filed in this case are considered together, and in connection therewith the inferences that may be deducted from such allegations, we are of the opinion that the facts stated were sufficient to authorize a court of equity to act in this case, and that they were also sufficient to authorize Mr. Smith to attack the validity of the bonds and trust deeds. The first issue of bonds which were delivered to the original subscribers as 4

a bonus were clearly void in their hands as being against public policy, for the reasons hereinbefore stated, and as pointed out by Mr. Justice Lurton in *Morrow v. Iron, etc., Co., supra*. In legal effect those bonds were of no greater effect as against Mr. Smith's judgments than if they had been issued for the express purpose of defrauding Mr. Smith, or to delay him in the collection of his judgments. Mr. Smith had a judgment lien on at least the real property of the company. That he had, or claimed, such a lien was alleged in the complaint and admitted in the answer, where it was also more particularly stated what the nature of the lien was and when it was obtained. From the complaint it also appeared that the corporation owned no property of any kind or character, nor could own any, on which the first trust deed which was given to secure the first issue of bonds was not claimed to be, and, *prima facie* at least, was a lien paramount to Mr. Smith's judgments. It would have been a needless thing therefore to have issued an execution and levied it upon the railroad property, because to have done so would have ended only in litigation. We venture the assertion that no one would have been willing to bid for or purchase the railroad property when offered for sale under an execution issued on Mr. Smith's judgment, because to do so would simply have meant the purchase of a law suit, of which this appeal offers ample proof. While we have no desire to, nor do we, depart from the salutary rule that either a judgment or other creditor may not ordinarily in a court of equity assail the validity of prior liens until such creditors have exhausted their legal remedies, yet, in view of the facts and circumstances which appear in this case, we think the court committed no error in permitting Mr. Smith to attack the trust deeds in this action.

With regard to the finding that the first issue of bonds and the trust deed securing the same have not been delivered to the trustee, we are of the opinion that the court erred. We think the evidence is not only sufficient, but is practically uncontradicted that the first issue of bonds and trust deed were both delivered to the trustee, but in the view

we have taken of the case the finding becomes really immaterial. This is also true with respect to all the other findings complained of, and hence it is not necessary that we specially pass upon those assignments. The same may be said with regard to all the other assignments of error.

The only question that remains, in view of the facts and the law applicable thereto, is, What relief are the parties to this action entitled to? We are of the opinion that the first issue of bonds and the trust deed given to secure it, as against the judgments in question, are void, and of no force or effect; that in no event can the stockholders be permitted to recover judgment on those bonds for more than the amount advanced to the Railroad Company after they had paid \$20,000 on their subscriptions, in case the court shall find that said sum, namely, \$10,000 with interest, was intended to be secured by the first bond issue; that the second issue of bonds is valid to the extent that the subscribers have advanced money on them, to-wit, to the extent of fifty per cent. of their face or par value, with interest as specified therein; that in view that no complaint is made of the ruling of the district court in holding that the lien created by the second trust deed constitutes a prior and paramount lien on the railroad property and franchises against the judgment in question, such ruling, so far as this appeal is concerned, must prevail; that the facts stated in the pleadings are sufficient to authorize the respondent to assail the validity of the bonds and trust deeds in a court of equity, and that such a court has jurisdiction in the premises.

In view, therefore, that the judgment appealed from is for too large an amount as against all corporate creditors and such stockholders as are not bond-holders and as against the corporation itself for the reasons hereinbefore stated, the judgment must be and it accordingly is reversed, with directions to the district court to set its findings of fact and conclusions of law aside so far as they conflict with the views herein expressed, or in so far as they are made immaterial by reason thereof; and said court is further directed to sub-

stitute proper findings of fact and conclusions of law in conformity with the views herein expressed; further, to enter a decree of foreclosure and order the sale of the property in question, and to make distribution of the proceeds derived from said sale as herein directed, neither party to recover costs on this appeal.

STRAUP, C. J., and McCARTY, J., concur.

ON APPLICATION FOR REHEARING.

Counsel for appellant have filed a petition for rehearing. The principal grounds alleged in the application, are: (1) That we erred in the interpretation given the constitutional provision set forth in the opinion respecting corporate indebtedness; and (2) in reversing the judgment for the second issue of bonds.

As to the first ground, counsel vigorously contend that the last sentence of the section quoted by us from the Constitution, namely, "All fictitious increase of stock or indebtedness shall be void," does not mean that bonds issued and delivered by a corporation to a stockholder for fifty cents on the dollar are for that reason fictitious to any extent. It is strenuously argued that if the indebtedness of the corporation is based upon any consideration whatever passing to the corporation, such indebtedness is not fictitious, and that the framers of the Constitution did not intend otherwise in adopting section 5 of article 12 of the Constitution which we have copied into the original opinion.

We cannot agree with this contention. If such a construction should be given to that section it might as well have been left out of the Constitution, because such a construction would rob the section of all force and effect. 5
Before the Constitution of this state was thought of a total want of consideration vitiated any corporate bond or other evidence of indebtedness, at least as between the parties and all those who could not claim to be innocent purchasers for value and without notice. If, therefore, we

should hold as counsel contend, the constitutional provision would in legal effect amount to no more than a declaration of the law in force before the Constitution was adopted by the people of this state. We cannot adopt this view.

We are forced to the conclusion that in adopting the constitutional provision with respect to corporate indebtedness both the framers of that instrument and the people who ratified it meant just what they said, namely, that all fictitious indebtedness should be void. By this they meant that corporations may not indirectly secure corporate subscribers by issuing bonds and delivering them to such subscribers as a bonus, or to dispose of them to the stockholders for a mere fraction of their face value. Those who are related to the corporation no doubt, if acting in good faith, may advance money or property, or perform services for such corporation and may in consideration therefor receive its bonds or other evidence of indebtedness from it; but if they do so they must be limited in their claims to the amount or value of the consideration which they gave for the bonds or the other evidences of indebtedness. Whatever the corporation promised to pay in excess of this constitutes a fictitious indebtedness. If this is not so, why were corporations as artificial persons singled out in the Constitution? Why not have left the subject of fictitious bonds or other evidences of indebtedness to be dealt with as the common law stood upon that subject, and which law applied to all indebtedness whether incurred by a natural or an artificial person? Since the Constitution refers only to artificial persons, namely, corporations, upon the subject of fictitious indebtedness, we must assume that it was intended to change the law upon that subject so far as such artificial persons are concerned, or the law would have been left as it was and would then have remained applicable to all persons alike, whether natural or artificial. We are well satisfied with the conclusion reached in the opinion upon this point.

It is, however, suggested by counsel that since we intimate that the rule laid down in the opinion as applicable to stockholders may not be applied to other holders of corporate

bonds or evidence of indebtedness, this distinction will be both unfair and difficult of application. A sufficient answer to this suggestion at this time is that we dealt only and could deal only with bond-holding stockholders in the original opinion. We excluded innocent purchasers of bonds for value and without notice from the opinion for obvious reasons. As to what shall constitute innocent purchasers of corporate bonds who purchase for value and without notice, and what the rights of such purchasers are under the constitutional provision referred to, can be best determined when that question is presented for decision. That good reasons may exist for making a distinction between stockholders as corporate creditors and others who in no way are related to the corporation is obvious. We have not attempted to, nor are we laying down any rule upon that subject. We leave it just where we think the Constitution of this state has placed it. In passing we remark, however, that we cannot see wherein either right or justice will greatly suffer if a corporate creditor (who is not an innocent purchaser of corporate bonds) is required to receive from the corporation in payment for his claim the exact amount, with interest, that he advanced to the corporation. Nor can we see how business interests will be adversely affected if a particular subscriber to corporate stock is prevented from securing his subscription by a lien on the corporate property, to the prejudice of general creditors and other innocent stockholders. The doctrine announced in the opinion practically goes no farther than this.

With regard to the second ground urged by counsel, we are of the opinion that counsel have misconceived the effect of the conclusion reached by us with respect to the priority of lien for the second installment of bonds. While it is true that we said that the second installment of bonds was valid only for fifty cents on the dollar, we nevertheless did not modify, nor attempt to modify, the judgment for the full amount of said installment, because that part of the judgment was not complained of by any one. In saying therefore that those bonds were invalid to the extent of fifty

cents on the dollar we meant that this was the legal effect of the constitutional provision in question, but in view that no complaint was made of the judgment which was for the full amount of the value of the bonds, the judgment would not be disturbed upon that branch. The statement in the original opinion may not have been as clear upon that point as it could have been made, but with what we have now said there can be no further misapprehension.

We cannot agree with counsel, however, that we erred in reversing the judgment for the reason that it was excessive. No other conclusion than the one reached in the original opinion is permissible. The judgment in favor of appellant, in so far as the amount thereof is concerned, reads as follows: "That the plaintiff to have and recover of the defendant, the Ogden & Northwestern Railroad Company, the sum of seventy-five thousand, two hundred and fifty-three dollars (\$75,253)." This judgment is entered as an entirety and covers every bond that was issued and delivered by the railroad for any purpose, or to any one. The other matters contained in the judgment almost entirely refer to the liens and to the priority of such liens. The judgment, therefore, with respect to the amount for which it was rendered, came before us as a whole and we had to review it as such. The only reason we did not review that portion of the judgment which established a first lien in favor of appellant for the full amount of the second issue of bonds was because that part of the judgment was expressly excluded from the notice of appeal and no one who was interested or had a right to complain complained of it in this court. This, however, does not apply to that part of the judgment we have herein set forth in full. As to that various exceptions were taken and urged upon us for consideration. We held the first issue of bonds as void *in toto* as against respondent Smith, and void as against the Railroad Company in so far as it is not supported by a consideration other than what the holders thereof paid upon their stock subscription. There being no finding upon that particular question, and no proper finding being possible upon that point under the evi-

dence as it now stands, we reversed the judgment for \$75,253 as excessive and remanded the cause to the district court, so that that court may ascertain the amount, if any, that the judgment should be upon the first bond issue, enter judgment therefor, and then order the judgment, executed by ordering a sale of the property, and divide the proceeds of sale in the order herein suggested.

In view that the result reached in the former opinion is right, the judgment there entered with the foregoing explanations is adhered to.

No reasons appearing why a rehearing should be granted, the application is denied.

STRAUP, C. J., and McCARTY, J., concur.

HOLT v. NIELSON et al.

No. 2104. Decide June 6, 1910 (109 Pac. 470).

1. **TRIAL—INSTRUCTIONS ALREADY GIVEN.** Where the substance of a requested charge was fully given by the court, the requested instruction was properly refused. (Page 571.)
2. **ACTION—SPLITTING CAUSES OF ACTION.** An action based on the breach of a different agreement from that on the breach of which the present suit is based was a different cause of action, so that there could be no question of splitting of a cause of action. (Page 571.)
3. **APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.** Any error in excluding the answers to certain questions was not prejudicial to defendants where they got such evidence before the jury at different times during the trial. (Page 573.)
4. **WITNESSES—APPEAL AND ERROR—DISCRETION OF TRIAL COURT—CROSS-EXAMINATION.** Considerable discretion is vested in trial courts as to the questions allowable on cross-examination to test the memory or credibility of witnesses; and, in the absence of prejudicial abuse of such discretion, a judgment will not be reversed for error in unduly restricting or extending the scope of cross-examination.¹ (Page 573.)

¹ Anderson v. Salt & O. Ry. Co., 35 Utah, 509, 101 Pac. 579.

5. **WITNESSES—EXAMINATION—REDIRECT EXAMINATION.** In an action for damages for failure to deliver three hundred sheep, where a witness was asked on cross-examination whether defendant had not sold certain rams which did not include the rams in controversy, a question on redirect examination as to how much defendant got for a certain lot of sheep was not proper redirect examination, and was properly excluded. (Page 578.)
6. **APPEAL AND ERROR—HARMLESS ERROR—EXCLUSION OF EVIDENCE.** Any error in excluding such question could not have injured defendant. (Page 573.)
7. **APPEAL AND ERROR—SCOPE OF REVIEW—REASON FOR RULING—EXCLUSION OF EVIDENCE.** If a ruling excluding answers to certain questions was correct for any reason whatever, no error was committed in excluding them. (Page 573.)
8. **PLEADING—PLEADING BY REFERENCE.** An answer by referring to pleadings in a former action made such pleadings a part of it by reference. (Page 576.)
9. **TRIAL—ARGUMENT—COMMENT ON PLEADINGS—PROPERTY.** If pleadings in a former action are made a part of the answer in the present action by reference thereto, counsel can comment thereon in argument in the same manner as on the answer in the present action. (Page 576.)
10. **APPEAL AND ERROR—VERDICT—CONCLUSIVENESS.** Where, though the jury could have found a larger verdict for plaintiff than it did, they were also justified in finding for defendant, the verdict for plaintiff, under proper instructions, cannot be disturbed on appeal, though the appellate court might have decided differently. (Page 577.)
11. **TRIAL—FINDINGS BY COURT—CONFORMITY TO EVIDENCE—HEARSAY.** Hearsay evidence could be ignored by the court in making findings on questions of fact. (Page 577.)
12. **WITNESSES—SUBPOENA—SERVICE—PERSONS AUTHORIZED TO SERVE.** A subpoena may be served by any person. (Page 578.)
13. **WITNESSES—MILEAGE FEES.** Comp. Laws 1907, sec. 994, entitles every witness legally required to attend the district court to one dollar and one-half for each day's attendance, and twenty cents for each mile necessarily traveled in going, and section 3419 provides that service of a subpoena is made by showing the original and delivering a copy to the witness personally, or by leaving a copy of the same with some suitable person at the place of his abode. *Held*, that where a witness leaves his home pursuant to a subpoena or is served while away from home and returns to his home in due course of business before going to testify, he may claim mileage fees,

and witnesses who were notified at their homes by telephone by the sheriff that he had subpoenas for them, and, pursuant to such telephone communication, came to the place of trial, were entitled to mileage fees from their homes to such place. (Page 579.)

14. WITNESSES—MILEAGE FEES—"LEGALLY REQUIRED TO ATTEND." A witness may waive the manner of service and accept service in some other form though not in strict compliance with the statute, and he will be required to obey a subpoena so served, so that such witnesses were "legally required to attend," within Comp. Laws 1907, sec. 994, so as to be entitled to mileage fees from their home to the place of trial. (Page 580.)

Appeal from District Court, Third District; *Hon. M. L. Ritchie*, Judge.

Action by Robert N. Holt against A. J. Neilson and another, copartners as Nielson & Kearnes.

Judgment for plaintiff. Defendants appeal.

AFFIRMED.

Moyle & Van Cott for appellants.

Stewart & Stewart for respondents.

FRICK, J.

Respondent brought this action against the appellants to recover damages for their failure to deliver to him 300 head of buck sheep which respondent under the terms of a written agreement or bailment had delivered to appellants, and which agreement was set forth in full in the complaint, and, further, to recover damages for the value of certain wool which appellants had obtained from said sheep, and which it was alleged appellants had converted to their own use. In their answer appellants admitted the receipt of "300 head of rams" from respondent, and denied generally all the other allegations of the complaint. As affirmative defense appellants set forth in their answer that they had at a specified time returned to respondent "229 head of said rams referred to in the agreement mentioned in plaintiff's complaint." As a

plea of accord and satisfaction, appellants further averred that, at a time subsequent to the delivery of said 229 head, they had also delivered "38 head of defendants' rams" which were delivered and accepted "in full satisfaction, discharge, payment and delivery" for the rams set forth in respondent's complaint. As a further defense, appellants set forth in their answer that respondent, before the bringing of this action, had instituted a former action against the appellants; that in said action certain matters relating to the cost of keeping and feeding the sheep in question were in issue; that respondent failed to set forth in said action the matters now in issue, and, "because of his failure so to do, he has waived any and all rights which he may have in the premises, and is thereby barred and estopped" from maintaining the present action. Respondent filed a reply in which he denied the affirmative matters set up in the answer, except that he had prosecuted a former action. He, however, alleged in his reply that both the parties and subject-matter in the former action were different from what they were in the present one. A trial upon the foregoing issues to a jury resulted in a verdict for the respondent. The court entered judgment upon the verdict, from which appellants prosecute this appeal.

There are seventy-seven errors assigned. The alleged errors relate to the admission and exclusion of evidence; to the giving of certain instructions to the jury, and the refusal to give certain requests asked by appellants; to misconduct on the part of respondent's counsel at the trial; and to errors committed in refusing to retax costs. In appellants' brief the errors that are argued are presented under twenty different heads. We remark that the record is quite voluminous, and the evidence is not of that character which permits us to set it forth, even in condensed form. Nor would a statement of the facts be of any particular advantage to either of the parties, the court or any one else. In view of the numerous assignments, and their character, we can do no more than to give our conclusions in the briefest possible terms. If we deem it necessary to refer to any of the facts, we shall

do so in connection with the discussion of the particular assignment. Nor can we devote space for the purpose of inserting the numerous instructions that are complained of nor the requests which were refused. The instructions were quite long. They covered all the issues, and fairly presented the theories of both sides to the jury. We shall only refer to the instructions by number, and, where necessary, state the subject to which they relate. For convenience, we shall consider the assignments in the order in which they are presented in appellants' brief.

The first one relates to an alleged error in giving instruction No. 4. In this instruction the court simply laid down a guide for the jury to follow for the purpose of determining the number of sheep appellants should account for to respondent. In the latter portion of the instruction, the court referred to the thirty-eight head which appellants claim were received by respondent as an accord and satisfaction, as set forth in their answer. By inserting that matter the instruction became a little obscure. If it is read and considered in connection with the instructions which follow it, the jury could not have been misled. Moreover, the instruction is excepted to as a whole, and we do not think it is bad in its entirety. We cannot say, however, that the appellants were prejudiced by the giving of this instruction.

The next error assigned refers to instruction No. 5, as given by the court. We cannot agree with counsel for appellants in their interpretation of that instruction. Viewing it as a whole and in the light of the evidence, we are of the opinion that the court committed no prejudicial error in giving it.

Nor is the alleged error with respect to the giving of instruction No. 6 availing. Here again the exception is to the whole instruction. The instruction, however, states a correct proposition of law when applied to the issues.

The objection to instruction No. 7 cannot be sustained. While the instruction is not as clear and explicit as it could have been made, it nevertheless, when considered as a whole, fairly states the law applicable to both the issues and the

evidence so far as either or both are covered by it. When this charge is considered in connection with the other charges given by the court, appellants have no cause for complaint.

There is no merit to the contention that the court erred in giving instruction No. 8 to the jury. Nor did the court err in refusing appellants' request No. 5, if for no other reason than that the substance of the request was 1 fully covered by instruction No. 13 given by the court. The same result must follow with respect to the alleged error in refusing appellants' request No. 12. In No. 19 of the court's instructions all that appellants asked was given in language even more favorable to them than that contained in their request just referred to.

It is urged with some vigor that the court erred in refusing appellants' request to direct a verdict for them. The contention is apparently based upon that part of affirmative matter contained in the answer by which appellants had set forth that respondent had waived or lost his right to recover in this action because he had failed to set forth the matter in issue in this action in a former action. We have carefully examined the pleadings in the former action, and nothing that was in dispute in this action was involved in the former. Nor can we see how respondent could have litigated the matters set forth in the complaint in this action in the former one. That action was based on a different agreement—one that was entered into at a different time. The present action was therefore not for the same cause of action.

The question, therefore, is not one of "splitting" a 2 cause of action and bringing two actions where the law allows but one, and, if it is not, we know of no law or reason that requires a party to join all the causes of action he may have against one or more individuals in one action or complaint. There is no contention that the matter involved in this suit was *res judicata*, and hence the court was clearly right in refusing the request.

The next assignment relates to some remarks the judge made during the trial in the presence of the jury. In doing so, it is contended error resulted because the judge in what

was said "invaded the province of the jury." What the court said follows: "As I understand you, he qualified it to that extent on cross-examination himself. I do not see that there is anything to rebut or anything to deny. The statement that is strongest against his interest is always that one that is entitled to be considered." In referring to the original bill of exceptions, it is there disclosed that the remarks made by the judge were called forth by a colloquy between counsel with respect to what a witness had or had not testified to. In making the statement the judge was addressing respondent's counsel, and in that connection referred to the witness, as appears in the foregoing quotation. We cannot see how appellants could have been prejudiced by what the court said under any condition in view of the circumstances under which the statement was made. The contention that the court committed error is in our judgment wholly without merit.

The next two assignments relate to similar remarks of the court. In our opinion appellants could have been affected in no legal right in anything the court said. Without setting forth the statements attributed to the judge, it must suffice to say that it is not easy to conceive how the judge could have said anything less harmful under the circumstances than he did, if he said anything at all on the subject.

The next four assignments relate to errors which it is alleged the court committed in sustaining certain objections to certain questions appellants' counsel propounded on cross-examination to respondent when testifying as a witness in his own behalf. In again referring to the original bill of exceptions, it is made to appear that counsel for appellants sought to have respondent answer the question why he did not include in the former action the matters set forth in the present complaint. The objection that the question was not proper cross-examination was sustained. This same question was subsequently asked at three different times and in three different ways, and the objection thereto was sustained upon the same grounds. This is what is covered by the four assignments aforesaid. In ruling on the objection, the bill

of exceptions shows that the court in addressing appellants' counsel said: "The present ruling of the court is that it is not proper cross-examination. You may have an opportunity at the proper time when you offer your evidence." Moreover, if it were conceded (a matter not decided) that technically the court erred in excluding the answer of the witness at the time, yet it is apparent from the whole record that appellants' counsel at different times during the trial got all of this evidence before the jury, and thus ob- 3, 4 tained the full benefit of the questions. This was all he was entitled to, and hence no prejudicial error was committed in sustaining the objections just referred to. In this connection it is well to remember that considerable discretion is vested in trial courts with respect to the extent that cross-examination shall be allowed in testing the memory or on any matters affecting the credibility of the witness, and unless it is made apparent that this discretion has been abused, to the prejudice of the losing party, a judgment will not ordinarily be reversed for a mere error in either restricting or extending the scope of the cross-examination. (*Anderson v. Salt Lake & O. Ry. Co.*, 35 Utah, 509, 101 Pac. 579.)

There is no merit in the next three assignments, and for that reason we shall not discuss them.

Nor did the court err in sustaining the objection of respondent's counsel to a certain question asked by appellant's counsel of Mr. Howard, who testified as a witness on behalf of appellants. The question was propounded on redirect examination. On cross-examination the witness had been asked with respect to whether Mr. Nielson had not sold certain rams, which in no way were related to or had any connection with the rams in controversy. On redirect counsel for appellants asked the witness this question: "How much did Nielson get a head for this whole lot he sold to Adams?" By this lot counsel meant a certain lot of sheep. The court refused to permit the witness to answer over respondent's objection. We cannot conceive how appellants were prejudiced by this ruling. Moreover the ruling was clearly right, if for no other reason than that the question 5, 6, 7

was not proper redirect examination. If the ruling was right for any reason, the court committed no error.

The next assignment refers to a question asked a witness with regard to the number of sheep appellants had returned to respondent, and the witness answered "192." Counsel contend this evidence was entirely immaterial. If their theory of the case were accepted as the true, or only possible one, this contention might be sound. Under respondent's theory of both the facts, and the law applicable thereto, the evidence was, however, quite material. What weight, if any, the answer of the witness should be given, under all the circumstances, was a question for the jury. The court committed no error in permitting the answer. Again, if the court erred in permitting it, we cannot see in what way the answer was prejudicial to the appellants' rights.

The next assignment relates to the exclusion of appellants' Exhibit No. 4. The exhibit was an agreement in writing entered into between a witness for respondent and one of the appellants relative to a sale and transfer of a large number of sheep. The witness had testified to the condition and value of the sheep respondent had bailed and delivered to appellants under the contract in question, and also to the value and condition of those that appellants had redelivered to respondent under said contract. Exhibit No. 4 contained certain statements with respect to the condition and value of the sheep therein referred to, which statements appellants' counsel contend did not square with the statements of the witness while testifying in this case. It is also contended that the statements contained in Exhibit No. 4 and the statements of the witness were contradictory or conflicting, and therefore the exhibit should have been admitted to contradict the statements of the witness with a view of affecting his credibility. An examination of the bill of exceptions again discloses that counsel were not hampered in any way in getting before the jury all matters that in any way affected or could affect the credibility of the witness above referred to. Exhibit No. 4 was not proper evidence for any purpose in this case, and, in view of the surrounding circumstances,

what was contained therein was not an admission of any fact by the witness which would in any way have contradicted or affected the weight of his testimony, even though the writing had not been excluded for other good and sufficient reasons. The court committed no error in excluding the exhibit.

It is very strenuously insisted that the court erred in overruling appellants' motion for a new trial. The apparent contention—indeed, the only available one, in view of what we have already said—is that a new trial should have been granted upon the ground of misconduct on the part of counsel for the prevailing party. The alleged misconduct is made to appear from an affidavit made by counsel for appellants. The affidavit is to the effect that counsel for respondent, at the trial, and during his closing argument to the jury, “frequently referred” to certain pleadings which were attempted to be filed in a former action, and to which we have already referred; that the pleadings so referred to by counsel were in fact not permitted to be made a part of the pleadings in the former action, and never were offered or introduced in evidence in the present action; that, in answer to appellants' counsel's argument that the present action was commenced in bad faith, and without right on the part of respondent, counsel for respondent referred to said pleadings and to their contents, and argued to the jury that the reason that the matters complained of in the present action were not litigated in the former action was because the court on motion of appellants had eliminated the same from the pleadings in said action. Counsel for appellants therefore contend that in this way, and over their objection, respondent's counsel was permitted to refer to extrinsic facts not in evidence, and by reason thereof appellants were prejudiced before the jury. In view of what is contained in the answer of appellants, and in the light of all that transpired at the trial in the presence of the court and jury, as disclosed by the record, we are not prepared to assent to counsel's conclusions, namely, that respondent's counsel had not the right to make the answer he did make to the arguments of counsel for appellants, or that making it in the manner it was made

that appellants were prejudiced, or that they can now complain. In appellants' answer filed in this case all the pleadings in the former action—that is, the complaint, the amended complaint, the so-called cross-complaint, and the reply thereto—were all “made a part hereof by reference;” that is, all the pleadings in the former action were **8** made a part of appellants' answer by reference. The matter objected to was contained in one of the pleadings aforesaid, but was not permitted as a part of the pleadings or issues in that case. It is apparent, however, that appellants intended to, and for the purpose of bringing the former pleadings, whether they controlled on the former trial or not, into this case, they made them a part of their answer by reference. Whether pleading by reference is good practice or not is not the question now. The only question is whether appellants did not by their own act make the former pleadings a part of the answer in this case to the same extent as if the same had actually been incorporated into their answer. If they did, and we are of the opinion that this was both the intended and actual effect of what was done, then counsel for the respondent had the same right to refer to the pleadings in the former action that he **9** he had to refer to anything that was contained in appellants' answer, and no one contends that he was not authorized to refer to matters contained in the answer, although not formally introduced in evidence in this case. In view of all the conditions and circumstances disclosed by the record in this case (and our decision is limited to these), we are of the opinion that the trial court would not have been justified in granting a new trial upon the ground just discussed, and hence appellants have no legal cause for complaint.

One cannot read the brief of counsel for the appellants without being impressed that they feel that their clients have been prejudiced by the rulings of the trial court in the matters to which we have referred. Upon reading the entire record, however, the disinterested and unbiased mind becomes convinced that the alleged errors are more apparent

than real—technical rather than substantial. Many, if not all, of counsels' contentions must, therefore, be attributed to their zeal in attempting to protect at all hazards the interests of their clients. Zeal, when not permitted to go to extremes, is not only pardonable, but even commendable. Counsel should, however, remember that zeal, like the microscope, magnifies and distorts only to him who applies it to the object or image. To all others all things retain their natural size and due proportions. The court in dealing with a subject must therefore deal with it in its natural proportions, and in doing so must necessarily disappoint counsel at times. In this case the evidence is such that the jury might well have rendered a verdict for a larger amount for the respondent, and they would also have been fully justified in finding in favor of the appellants. These matters, however, were for the jury to determine, and if they did so 10 under proper directions from the court, with regard to the law applicable to the facts, the judgment of the jury must prevail, although not in accord with what we might have done. In looking over the entire charge of the court, we cannot find anything except mere verbal inaccuracies, which, however, were not of the character that would either benefit one side or prejudice the other. In the trial of the case the court was very liberal in admitting evidence, and both sides were given ample opportunity to develop their respective theories and to present them to the jury. After viewing the case in the light of the whole record, we are unable to find any prejudicial error on the merits of the case.

Finally, it is contended that the court erred in overruling appellants' motion to retax costs. The record as presented on this point is not satisfactory. So far as the 11 record discloses, the only evidence with respect to the matters complained of was hearsay, and hence the court might have ignored it. Assuming, however, for the purposes of this decision that the evidence was sufficient to raise the point, the question still remains whether appellants' contentions should prevail. The matter arose as follows Respond-

ent, before the trial, had a subpoena issued in due form, in which the names of at least four of his witnesses were inserted. These witnesses lived in Salt Lake County, but some distance from Salt Lake City, where the court was held. The return of the sheriff showed due service on the witnesses named, and they all attended and testified in the case. Counsel for appellants in his affidavit in support of the motion to retax costs, in substance, states that the deputy sheriff told counsel that the deputy had served the subpoena as follows: After receiving the subpoena he telephoned the witnesses at their homes that he had a subpoena for them requiring their attendance at the trial of this case; that the witnesses thereupon came to Salt Lake City, and, when they arrived there, the sheriff gave each of them a copy of the subpoena, and made service and return as required by law. Section 994, Comp. Laws 1907, in substance, provides that every witness "legally required to attend the district court . . . is entitled to \$1.50 for each day's attendance, and twenty cents for each mile actually and necessarily traveled, in going only." Section 3419, in part, provides that the "service of a subpoena is made by showing the original and delivering a copy, or a ticket containing its substance, to the witness personally, or by leaving a copy with some suitable person at the place of his abode." Service of subpoenas may be made by any person.

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It is contended that the witnesses were not properly served with subpoenas, and were not "legally required to attend the district court," and hence not entitled to mileage. Counsel have not referred us to any authorities upon the subject, and have submitted the matter upon the several sections of the statute we have referred to. In view of the authorities that we have been able to find by independent research, we think a witness within the distance that he could be legally required to attend court when served with a subpoena may waive the manner of service and may accept service in some other form, though not in strict compliance with the statute, and, when he does so, he will be required to respond in obedi-

ence to the subpoena the same as though served in strict conformity with the statute.

In the case entitled *Mt. Olivet, etc., Ass'n v. Dalton*, 53 Mo. App. 345, the rule, as stated in the syllabus, is as follows: "A witness, who accepts service of a subpoena, attends under process and not voluntarily, and is entitled to his costs, including mileage." This case is followed in *McHoney v. Kerwin*, 56 Mo. App. 459. In *Feree v. Strome*, 1 Yeates (Pa.) 303, it is held that "a witness may by his own act dispense with the legal forms of serving a subpoena, and will be under contempt for non-attendance." Practically the same rule is laid down in *Chic., etc., Ry. Co. v. Dunning*, 18 Ill. 494. In *Pike v. Nash*, 16 How. Prac. (N. Y.) 53, it is held that a witness, although served at a point other and nearer to the court than his home, is nevertheless entitled to mileage for the entire distance between the court and his home. The doctrine laid down in the foregoing cases seems both reasonable and just. Suppose the sheriff a day or several days before the trial of this case had met respondent's witnesses in Salt Lake City, and had there served them with the subpoena in due form, could they not have gone to their homes in the meantime and on the day they were required to attend court have returned to Salt Lake City, and thus become entitled to mileage for the distance between their home and Salt Lake City? Where is there any difference in principle between the supposed case and the one at bar? In this case the witnesses were in fact duly served with a subpoena, but the service was made in Salt Lake City, and not at their homes. The witnesses in a strict legal sense were then legally required to attend court, although they were served at a place other than their homes. We think a reasonable construction of our statute with respect to the allowance of mileage requires us to hold that mileage be allowed for the entire distance between the home, the abode of the witness, and the place where the court is held, or where he is required to attend, and not only from the place where he was served with a subpoena. From what we have said, we do not wish to be understood as holding that a witness may claim

mileage from his home in case he is suddenly called on to testify while he is in court, or if found in the street or elsewhere at or near the place of holding court. What we mean is that if a witness leaves his home in obedience to a subpoena, or if he is served with a subpoena while away from home, and, before being required to testify, he, in due course of his business, returns to his home, then the foregoing rule applies, and the witness is entitled to mileage. In this case there is no evidence that the witnesses were not served some time before the day of the trial, and that they did not in due course of business return to their homes and 14 from thence return to testify in the case. The ruling of the court, therefore, cannot be said to be erroneous. If such is not the construction to be placed upon the statute, then litigants may frustrate the entire purpose of the statute by watching for and embracing the opportunity to serve witnesses when they are at or near the place where court is held. Moreover, we cannot see why a witness may not waive strict compliance with the statute with respect to service of a subpoena, and yet be legally required to attend court. No doubt in order to be required to attend the witness in the first instance may insist upon strict legal service, but it seems to us that the decisions in which it is held that he may accept substituted service and still be required to attend are manifestly based on good reason and sound legal principles.

In so far as the facts disclosed by the record are concerned the trial court could therefore have adopted either view of the law as outlined herein, and still have avoided legal error in overruling appellants' motion to retax costs.

The judgment, therefore, should be, and it accordingly is, affirmed, with costs to respondent.

McCARTY, J., and LEWIS, District Judge, concur.

SCHUYLER et al. v. SOUTHERN PACIFIC COMPANY.

No. 2034. Decided August 28, 1909. On Rehearing June 2, 1910 (109 Pac. 458).

1. APPEAL AND ERROR—TIME FOR TAKING APPEAL—COMPUTATION.

Though the verdict was rendered more than six months before the perfection of an appeal, the appeal will not be dismissed on the ground that it was not taken in time, where it sufficiently appears from the record that it was taken within the statutory period from the date of the order overruling a motion for a new trial. (Page 585.)

2. REMOVAL OF CAUSES—GROUNDS FOR REMOVAL—CASES ARISING UNDER CONSTITUTION AND LAW OF UNITED STATES—ALLEGATIONS OF PLEADINGS.

In an action against a carrier for the death of an assistant chief mail clerk, the complaint alleged that deceased, while not on duty, was riding on defendant's train, under an engagement between defendant and the United States government to transport the mail, together with the mail clerks and employees in the railway mail service, and that it was necessary for deceased in the discharge of his duties to ride in the mail cars, and that while he was "necessarily in a certain mail car" operated by defendant, and while he was being so transported by defendant "for a consideration" and under arrangements between defendant and the "government of the United States," the train was derailed, and deceased was killed. *Held*, that the complaint did not present a case of a civil nature at law, arising under the Constitution and laws of the United States within the meaning of the removal act, in that it involved the question as to whether under Const. U. S. art. 1, sec. 8, declaring that Congress shall have power to establish post offices and post roads, Act Cong. March 3, 1897, c. 385, 29 Stat. 644, pertaining to the messenger service in connection with railroads, Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), and acts amendatory thereof, including Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1149), Act Cong. June 13, 1898, c. 446, 30 Stat. 440, and Act Cong. June 9, 1896, c. 386, 29 Stat. 313 (U. S. Comp. St. 1901, p. 2724), and acts amendatory thereof and supplemental thereto, relating to the transportation of railway mail clerks, and the Hepburn Act (Act June 29, 1906, c. 3591, sec. 1, par. 4, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1151]), prohibiting common carriers engaged in interstate commerce from issuing or giving free interstate transportation for passengers, a mail clerk in the railway mail service of the United States when not engaged in the discharge of his duties as a mail clerk, and when traveling for his own convenience and purpose, can lawfully be given free interstate transportation, since

the complaint did not show on its face that deceased's right to transportation was derived from the federal statutes, or that his cause of action was based on such statutes. (Page 587.)

3. REMOVAL OF CAUSES—GROUNDS—CASES ARISING UNDER CONSTITUTION AND LAWS OF THE UNITED STATES. A case cannot be removed simply because in the progress of the litigation it may be necessary to give a construction to the Constitution or laws of the United States. (Page 588.)
4. INFANTS—ACTIONS BY—APPOINTMENT OF GUARDIAN AD LITEM. Comp. Laws 1907, sec. 2907, 2908, providing that, when an infant is a party, he must appear either by his general guardian or by a guardian *ad litem* appointed by the court in which the action is pending, and that a guardian *ad litem* may be appointed in any case when it is deemed by the court in which the action is prosecuted expedient to represent the infant, though he may have a general guardian and may have appeared by him, authorizes the appointment of a guardian *ad litem* for resident and nonresident minor plaintiffs as well as resident and nonresident minor defendants. (Page 588.)
5. TRIAL—INSTRUCTIONS—DUTY OF JURY TO OBEY. The jury is bound to follow instructions of the court, whether such instructions are right or wrong. (Page 593.)
6. CARRIERS—WHO ARE PASSENGERS—BURDEN OF PROOF. In an action for the death of a railway mail clerk, the burden of proving that deceased was in the discharge of his official duties at the time of the accident in which he was killed is on plaintiff. (Page 593.)
7. TRIAL—INSTRUCTIONS—WEIGHT OF EVIDENCE. In an action against a carrier for the death of a railway mail clerk, an instruction that it is to be presumed that deceased was in the railway car lawfully and rightly in the discharge of his official duties as such mail clerk, and the burden is on defendant to overcome that presumption by affirmative proof and by a preponderance of evidence, but that presumption would be overcome if it was shown by affirmative proof and by preponderance of the evidence that he was not in the discharge of his official duties, was erroneous, as invading the province of the jury on the weight to be given a mere inference of fact. (Page 593.)
8. EVIDENCE—BURDEN OF PROOF. An evidentiary showing, however strong, made by a party having the affirmative of an issue, whether by direct evidence of the witnesses or indirect evidence of inferences and presumptions, does not cast the burden on the other party to prove the negative, but the burden of proof in either case remains throughout with him who has the affirmative. (Page 594.)

ON REHEARING.

9. **CARRIERS—WHO ARE PASSENGERS—EVIDENCE.** In an action against a carrier to recover for the death of a railway mail clerk, evidence *held* insufficient to support a finding that at the time of the accident in which decedent was killed decedent was on defendant's train in the discharge of duties pertaining to the railway mail service. (Page 595.)
10. **CARRIERS—INJURIES TO PASSENGERS—PLEADING—VARIANCE.** In an action against a carrier to recover for the death of one alleged to have been a passenger, there can be no recovery on the ground of ordinary negligence of defendant in injuring a person not a passenger. (Page 597.)
11. **CARRIERS—INJURIES TO PASSENGERS—PLEADING AND PROOF—"MATERIAL VARIANCE."** Where a complaint alleged that plaintiff's decedent at the time of his negligent killing by defendant carrier was in the discharge of his duties as a railway mail clerk, a recovery may be had, though the evidence establishes that decedent at the time of the fatal accident was not in the discharge of his duties as a mail clerk, but was a gratuitous passenger, as a carrier owes the same degree of care in the transportation of a gratuitous passenger as in the case of a passenger for hire; and hence the variance was not material within the meaning of Comp. Laws 1907, secs. 3001-3003, providing that no variance between the allegations and the proof is to be deemed material unless it has actually misled the adverse party to his prejudice. (Page 597.)
12. **CARRIERS—INJURIES TO PASSENGERS—QUESTION FOR JURY.** In an action against a carrier to recover for the death of railway mail clerk, evidence *held* to conclusively show that decedent at the time of his death was rightfully on defendant's train so as to warrant the direction of a verdict in favor of plaintiff on the issue as to whether or not he was a trespasser on the train. (Page 600.)
13. **STATUTES—CONSTRUCTION—EXECUTIVE CONSTRUCTION.** While the rulings of the Interstate Commerce Commission as to the construction to be given to federal statutes relating to interstate commerce will be given great weight by the courts in determining the meaning of such statutes, such weight is not to be accorded to such rulings where they are given in a non-official character and in response to private inquiry. (Page 604.)
14. **CARRIERS—REGULATION—FREE TRANSPORTATION.** Congress may in prohibiting interstate carriers from issuing free transportation except such persons from the operation of the general prohibition as it may see fit. (Page 604.)
15. **STATUTES—CONSTRUCTION—EXCEPTIONS.** An exception of a particular thing from the operation of the general words of a statute tends to show that it was the opinion of the lawmakers that

the thing excepted would have been within the general words had not the exception been made. (Page 604.)

16. **CARRIERS—WHO ARE PASSENGERS—FREE TRANSPORTATION—"PASSENGERS FOR HIRE."** Employees of the railway mail service, traveling in the postal or mail cars in charge of the mails under a contract between the government and the carrier for the carriage of mail and the mail clerks, are "passengers for hire" to whom the carrier owes the same duty that it owes to the passengers riding upon the train in so far as its liability for personal injuries arising from its negligence is concerned. (Page 604.)
17. **STATUTES—CONSTRUCTION—EXCEPTIONS IN PENAL STATUTES.** Exceptions in penal statutes ought to be liberally construed in favor of him who is charged with a violation of the statute. (Page 606.)
18. **CARRIERS—INTERSTATE TRANSPORTATION—PASSES.** The Hepburn act (Act June 29, 1906, c. 3591, sec. 1, par. 4, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1151]), providing that no carrier subject to the provisions of the act shall issue in interstate commerce free transportation, except to railway mail service employees, cannot be construed to prohibit the issuance of a free pass to an employee of the railway mail service for transportation of such employee while not in the actual discharge of his official duties. (Page 606.)
19. **CARRIERS—INJURIES TO PASSENGER—FREE TRANSPORTATION—VIOLATION OF STATUTE.** Where an interstate carrier issued free transportation to an employee of the railway mail service for use by such employee while not on duty, it could not avoid liability to the personal representatives of such employee for its negligence in causing his death by alleging that such transportation was issued in violation of the Hepburn act (Act June 29, 1906, c. 3591, sec. 1, par. 4, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1151]). (Page 606.)
20. **CARRIERS—WHO ARE PASSENGERS—CONTRACT OF TRANSPORTATION.** The relation of carrier and passenger may exist independent of any contract between the parties for transportation. (Page 607.)
21. **CARRIERS—WHO ARE "PASSENGERS."** The test in determining who are passengers is whether the person desiring passage in good faith offered himself for the purpose of being carried as a passenger, and that he was as such accepted and received by the carrier, who undertook to transport him. (Page 611.)

Appeal from District Court, Second District; *Hon. J. A. Howell*, Judge.

Action by Mary R. Schuyler and others against the Southern Pacific Company.

From a judgment for plaintiffs and an order overruling a motion for a new trial, defendant appeals.

AFFIRMED.

P. L. Williams, George H. Smith and John G. Willis for appellant.

Agee & McCracken for respondents.

STRAUP, C. J.

This is an action brought by the plaintiffs and respondents to recover damages for the death of Charles A. Schuyler, alleged to have been caused by the defendant's negligence while a passenger on one of defendant's trains. A verdict was rendered for the plaintiffs on the 20th day of August, 1908. It is not made to appear when the judgment was entered. It is shown that the judgment was recorded on the 17th day of December, 1908. A notice of appeal was served and filed the 1st day of April, 1909. The statute provides that an appeal may be taken within six months from the entry of the judgment. While no motion is made to dismiss the appeal, it nevertheless is urged that we are without jurisdiction to entertain the appeal because it was not taken in time. It is assumed by the respondents that the judgment was entered on the day the verdict was rendered, and it is claimed by them that it is not shown by the bill of exceptions that a motion for a new trial was made, or, if made, when it was overruled, and therefore it is not affirmatively made to appear that the appeal was taken within six months from the entry of the judgment, or the overruling of the motion for a new trial. Though the judgment was entered on the day the verdict was rendered, yet we think the appeal was in time, for it is sufficiently disclosed by the bill of exceptions that a motion for a new trial was made 1 within time, and that it was overruled on the 4th day of January, 1909, at which time the judgment became final. The appeal was taken within six months from that time.

It is alleged in the complaint that the defendant is a common carrier of passengers for hire and owned and operated a railroad from Ogden, Utah, to San Francisco, Cal.; that, in connection with the business of carrying passengers for hire, the defendant had entered into engagements with the government of the United States to transport and carry between the points named United States mail, mail clerks, and employees employed in the railway mail service, including the deceased, for which the defendant received compensation from the government of the United States; that it was necessary for the deceased, who was an assistant chief mail clerk, in the discharge of his duties, to be in and ride on the mail cars operated by the defendant in carrying mails, and while he was "necessarily in a certain mail car" operated by the defendant in one of its trains from Oakland to Ogden, and while he was being so transported by the defendant "for a consideration and under arrangements between it and the government of the United States," the train between Gartney and Lucin stations, in Utah, was derailed through the defendant's negligence, and the deceased killed. A petition was filed by the defendant to remove the case to the Circuit Court of the United States in and for the District of Utah on the ground "that the suit herein is of a civil nature at law, arising under the Constitution and laws of the United States (Section 8 of Article 1), declaring that Congress shall have power to 'establish postoffices and post roads,' also 'to regulate commerce with foreign nations and among the several states.' Also under the act of Congress of the United States approved June 13, 1898, and June 9, 1896, and acts amendatory thereof and supplemental thereto, relating to the transportation of railway mail clerks, and other officers of the postoffice department of the government of the United States; also the act of March 3, 1897, pertaining to messenger service in connection with railroads, etc.; also act of Congress of the United States, approved February 4, 1887, and acts amendatory thereof, including the act approved June 29, 1906." The court denied the motion to remove. Complaint is made of this ruling. It is especially urged

by the appellant that plaintiffs' case necessarily involves a construction of section 1, par. 4, of the Hepburn act (Act June 29, 1906, c. 3591, 34 Stat. 584; Fed. Stat. Ann. Supp. 1907, p. 169 [U. S. Comp. St. Supp. 1909, p. 1151]), which prohibits common carriers engaged in interstate commerce from issuing or giving free interstate transportation for passengers, except the persons and classes therein specified. It is contended that the case involves the question as to whether under the statute a clerk in the railway mail service of the United States, when not engaged in the discharge of his duties as a mail clerk, and when traveling for his own convenience and purpose wholly unconnected with any official duty, can lawfully be given free interstate transportation as in the act provided for the free transportation of railway mail clerks. The appellant claims that the statute forbids free interstate transportation for mail clerks in such case, and that the deceased on his trip from San Francisco to Ogden, when the derailment occurred, was so traveling for his own convenience wholly unconnected with any official duty, and that he was therefore not a passenger, but a trespasser. It, however, is averred in the complaint that the deceased was transported by the defendant under arrangements between it and the government of the United States by which the defendant engaged for a consideration and upon compensation received by it from the government of the United States to safely transport the deceased between the points named, and that the defendant, under such arrangement, had undertaken to so carry and transport the deceased. On the face of the complaint, it is not made to appear that the deceased's right to transportation was acquired by virtue of the federal law referred to, nor that the construction of a federal law is involved, nor that plaintiffs' case is dependent upon a federal law. Nor is it alleged in the complaint that the deceased was not in the discharge of his public duties, nor that he was traveling for his own convenience. The allegations of the complaint show rather the contrary. To make a suit arise under a law of the United States, the plaintiff must claim some legal right under such

law to sustain his cause of action, which legal right is controverted by the defendant; and to make a case removable from the state court to the Circuit Court of the United States, under the present general statute, on the ground that it arises under a law of the United States, it must appear from the plaintiff's statement of his cause of action in the initial pleading that it does so arise. (Moon on Removal of Causes, sections 101, 104.) A case cannot be removed simply because in the progress of the litigation it may be necessary to give a construction to the Constitution or laws of the United States. It not being made to appear by the plaintiffs' complaint that a federal law is involved, the court did not err in denying the motion for removal. 3

The suit was brought by Mary R. Schuyler, the deceased's widow, and his minor children by a guardian *ad litem*. The appointment of the guardian was alleged in the complaint. When the plaintiffs offered in evidence the order of the appointment, the defendant objected on the grounds that the statute only provides for the appointment of a guardian *ad litem* in a pending action, and then only for non-resident minor defendants, that the minor plaintiffs were non-residents, and that no action was pending when the order appointing the guardian was made. 4

We think the statute (Sections 2907-8, Comp. Laws 1907) contemplates and provides for the appointment of a guardian *ad litem* for resident and non-resident minor plaintiffs as well as resident and non-resident minor defendants.

In the defendant's answer, it was admitted that the deceased was in the employ of the government of the United States as a railway mail clerk, and that the defendant was a common carrier for the transportation of property and passengers for hire, as averred in the complaint, and "that contractual relations existed between the defendant and the government of the United States with respect to the carrying of certain United States mail and certain employees of said government to whom was intrusted the supervision and care

of such mails as were by defendant transported under the agreement aforesaid, and that the defendant received compensation therefor." It denied the alleged negligence, and pleaded that the deceased was only entitled to be upon the mail cars when he was in the discharge of his duties as a mail clerk, and that he, without the consent and knowledge of the government of the United States or the defendant, and in violation of the agreement existing between the defendant and the government, and with the intent, and for the purpose of deceiving the government and the defendant and avoiding the payment of fare, entered the mail car, and wrongfully, fraudulently, and in violation of law, and without the consent and knowledge of the defendant, remained in the car, and attempted to secure transportation therein, and, while he was so wrongfully and fraudulently upon the car, he received the injuries which resulted in his death. Upon these issues, the court instructed the jury that if they found from the evidence that the deceased was traveling on the defendant's train, and was not performing duties relating to the mail service, but was traveling "simply for his own purpose unconnected with any official duties," he was not a passenger for hire, but a trespasser to whom the defendant would not be liable for the alleged negligence and resulting injury. The appellant contends that the evidence without dispute shows that the deceased was traveling on the defendant's train "simply for his own purpose unconnected with official duties," and that the verdict which was rendered by the jury was therefore contrary to the evidence and against the charge.

The evidence without dispute shows the following facts: In November, 1906, the deceased, who then lived at Oakland, Cal., and who was in the employ of the United States mail service at San Francisco, was appointed an assistant chief clerk of the railway mail service with headquarters at Ogden, Utah. The Postmaster General issued to him the following commission: "Post-Office Department, Washington, D. C. To Whom Concerned: The bearer hereof, Charles Albert Schuyler, has been appointed an assistant chief clerk, railway

mail service, with headquarters Ogden, Utah, and will be obeyed and respected accordingly. Railroad companies are requested to extend to the holder of this commission the facilities of free transportation on the lines named on opposite page. If fare is charged receipt should be given. Valid only when issued through the office of the Second Assistant Postmaster General and countersigned by James E. White." This was signed by G. B. Cortelyou, the Postmaster General, and countersigned by James E. White, general superintendent. On the opposite page were the words: "Good between all stations Utah, Idaho, Nevada, California, Montana and Colorado." The position to which the deceased was appointed embraced the territory of Utah, a portion of Montana and Idaho, and a small portion of Nevada and Colorado. It did not include any portion of California. The chief clerk at Ogden, the assistant chief clerk, and all mail clerks running between San Francisco and Ogden, were under the supervision of the general superintendent at San Francisco. The superintendent testified that the deceased was required to perform "all of the duties assigned to him (by the chief clerk at Ogden), office duties assigned to him by the chief clerk, in addition to that, took the place of the chief clerk in the chief clerk's absence, and became the acting chief clerk, with all of the powers of chief clerk; performed all the duties of the chief clerk, had the general duties assigned him of overseeing the service. . . . "The chief clerk, or assistant chief clerk" was required to "pay particular attention to the service, if he is properly performing his duties, whenever he is around a mail car, whenever he is at a transfer station or comes in contact with railway postal clerks, in other words, anything that pertains to the transportation of mail is under his care, and carried with it the responsibility to all officials of the service. . . . All officials of the service are expected and are instructed to pay particular attention to the service, whether or not it comes within his particular scope. . . . We have general unwritten laws or regulations requiring every official of the service to be on watch regarding the service. . . . The chief clerk at

Ogden had jurisdiction only over the helpers running west on the line on which the accident happened. . . . All postal clerks work directly under the chief clerk of the local district. The chief clerk is required to report at the end of the probationary term of the clerk, as to his fitness for permanent employment. On that report I base by recommendation to the department at Washington, and the report of the chief clerk determines, in a large measure, whether or not the clerk shall be retained. The duty of the assistant chief clerk, if he comes in contact with the postal clerks, whether or not he finds an irregularity, is to make a report to his chief clerk immediately upon his return. Blank forms are furnished to all offices for such purposes." The chief clerk at Ogden testified: "The duties of an assistant chief clerk were an assistant to the chief clerk in the performance of the duties and attending to any matters that might be assigned to him by the chief clerk. At any time he would be on the road he would be expected to ride in the mail car and take notice of anything that would be for the improvement or betterment of the service, either in the plan of work pursued by the clerks or the distribution." The deceased, at Ogden, received a telegram from Oakland announcing the death of his child. With the permission of the chief clerk at Ogden, he took the first fast mail train for California. The chief clerk furnished him a portable cot, blankets, and bedding to occupy quarters in a mail car. When he left Ogden for Oakland there was no official business requiring him to make such a trip. No instructions were given him in respect of any business or duties pertaining to the service. The chief clerk at Ogden in supervising the business of his territory was required, from time to time, to go on the road on official business. But he had always performed such duties himself. The performance thereof had at no time been required of the deceased. When the deceased arrived at San Francisco, he there called on the general superintendent, and informed him of the death of the deceased's child. No matters were discussed, and no transactions were had relating to the mail service. Nothing was talked about between them except the deceased's misfortune and bereavement. The superintendent inquired

of him when he intended to return to Ogden. He answered the following day. They discussed the train which he would take and the time he would reach Ogden. On the 12th day of January, 1907, the deceased, on his return trip, at Oakland, in the presence of the train agent and the conductor in charge of the train about to leave for Ogden, entered a mail car with his grips. The evidence of his right to transportation on the defendant's train was the commission issued by the Postmaster General. There were some mail clerks in the car. He, however, had no supervision or direction over them. While it is made to appear that in going from Ogden to Oakland and in returning from Oakland to the place of the derailment the deceased traveled in a mail car, yet it is not made to appear what, if anything, he did in the mail car, or that he rendered any service, or performed any duties pertaining to the railway mail service. We think the only conclusion authorized from the evidence is that he was traveling in the mail car on account of matters personal to himself and wholly unconnected with his service to the government. We do not say that the commission issued to the deceased, if recognized and accepted by the defendant, did not entitle him in such case to the transportation in question, or if the commission was recognized and accepted by the defendant, and by virtue of it the defendant assumed and undertook to carry and transport the deceased, and he in good faith believed the commission entitled him to the transportation, that the deceased was a trespasser on the defendant's train, or that it was not liable to the plaintiffs for the consequences of its alleged negligence, though under the Hepburn act the defendant could not lawfully give him free transportation, except when he was on duty. But in the complaint it is in effect alleged that the defendant had agreed and received compensation to carry the deceased when he was in the discharge of duties as clerk of the railway mail service, and that the deceased was in the mail car in the discharge of such duties. The defendant admitted that it had entered into arrangements with the United States government to carry the deceased in such case, but alleged that he was not

in the discharge of duties, and had not entered the car for any such purpose, but, on the contrary, had entered the car, and knowingly and fraudulently and without the knowledge or consent of the defendant attempted to ride therein in violation of the defendant's agreement with the government to carry mail clerks. The court gave the jury binding instructions to render a verdict for the defendant if they found that the deceased was traveling in the mail car, and was "not performing any of his duties as such assistant chief clerk on said train," but was traveling "simply for his own purposes unconnected with any official duties." The court conditioned the right of recovery upon the performance of such duties on the train by the deceased, regardless of all other questions. It was the duty of the court to instruct the jury in matters of law; and the jury, as matter of duty, were bound to follow the instructions. Right or 5 wrong, they were the law of the case for the jury to obey and follow. This they did not do. We find no evidence to warrant a finding of the condition upon which the court instructed the jury the plaintiffs could recover.

In this connection, the court also charged the jury that it was undisputed that the deceased was an employee of the railway mail service, and that at the time of the injury he was in a mail car "on the defendant's line of road, and I charge you the presumption is that he was there lawfully and rightfully in the discharge of his official duties as such employee, and the burden is upon the defendant to overcome that presumption by affirmative proof and by a preponderance of all the evidence;" but that the presumption would be overcome if it was shown by affirmative proof and by a preponderance of the evidence that he was not in the discharge of his official duties. The relation of carrier and passenger for hire between the defendant and deceased was in effect alleged by the plaintiffs, or such a relation as gave the deceased rights of a passenger, and imposed upon the defendant corresponding duties and obligations of a carrier of passengers. Such a relation was denied by the defendant. The 6, 7

burden was upon the plaintiffs, not the defendant, to establish it. That burden did not shift, but rested upon the plaintiffs throughout the case. And, if upon all the evidence it was not established by a fair preponderance, the plaintiffs, and not the defendant, must fail. The charge of the court is not only in conflict with these well-recognized principles, but also invaded the province of the jury on the weight to be given a mere inference of fact. It in effect told the jury that a certain presumption of law arose; that is, that a definite probative weight in law attached by reason of certain undisputed facts, and that the burden was cast on the defendant to overcome it by affirmative proof and by a preponderance of the evidence. What the court thus incorrectly characterized a presumption of law by instructing the jury to give it a definite probative effect was, at most, a mere inference of fact, and a fact, too, which, under the charge of the court and the law of the case as given the jury, was essential to plaintiffs' right of recovery. That is to say, the court, in other portions of the charge bound the jury to find that the deceased was in the discharge of his duties as a mail clerk before they could properly render a verdict for the plaintiffs, and here told them that such fact was established as matter of law by the undisputed proof of certain other facts, and then cast the burden on the defendant to overcome such presumption by affirmative proof, and by a preponderance of the evidence that the deceased was not in the discharge of his duties. An evidentiary showing, however strong, made by a party having the affirmative of an issue, whether by direct evidence of the testimony of witnesses or indirect evidence of inferences and pre- 8
sumptions, does not cast the burden on the other party to prove the negative, but the *onus probandi* in either case remains throughout with him who has the affirmative. The court, therefore, in directing the jury to give a definite probative effect to the admitted facts, and in casting on the defendant the burden of proving the negative to overcome such effect, committed error.

It is not necessary to express an opinion on the question presented as to whether the Hepburn act permits an interstate carrier to give free intrastate transportation to railway mail clerks when not on duty, for the reason that it is alleged in the complaint and admitted in the answer that the arrangement existing between the defendant and the government of the United States for the transportation of the deceased was for hire and when he was in the discharge of duties in the railway mail service. It was alleged in the complaint, and denied in the answer, that he was in the discharge of such duties. With respect to the relation between the defendant and the deceased that was the only issue submitted to the jury. And, as already held by us, we do not find sufficient evidence to support the verdict which was rendered thereon.

For the reasons given, the judgment is therefore reversed, and the case remanded for a new trial, costs to appellant.

FRICK and McCARTY, JJ., concur.

ON REHEARING ON RESPONDENTS' APPLICATION.

STRAUP, C. J.

A petition for rehearing was filed on behalf of respondents. They urged that we had overlooked evidence tending to show that the deceased was traveling in the mail car in the discharge of duties. They further urged that, though he was not in the discharge of duties, nevertheless, upon the undisputed evidence showing that the appellant received him as a passenger and as such undertook to carry and convey him and that his death was caused by its negligence, the respondents were entitled to recover as matter of law. A rehearing was granted, and the case reargued and resubmitted.

We have reread the record, and again reached the conclusion that there is no evidence to support a finding that the deceased was traveling on appellant's train in the discharge or in pursuance, of duties pertaining to the railway mail service. Upon the evidence adduced the only permissible inference is that he left Ogden and went

to Oakland solely on account of the death of his child, and that he was on the return journey of such a mission when the train was derailed. Whatever presumption might be indulged under other circumstances that he was in the discharge of railway mail duties from the facts that he was a railway mail clerk and was in a mail car is entirely overcome by the affirmative and direct showing that there was no business or engagement relating to his service which occasioned or required the trip to be made by him; that no directions, instructions, or requests were given to or made of him in respect thereof; that duties on the road had theretofore always been performed by his chief and not by the deceased; and that the trip was occasioned solely on account of the death of his child.

The other proposition is more difficult. The claims made by the respondents in that regard are: (1) That under the Hepburn act the appellant could lawfully give, and the deceased receive, free transportation, it being conceded that he was a railway mail service employee, though he was not on duty and was traveling on account of mere personal matters; and (2) though the act did not permit the giving of free transportation in such case, and though the appellant could not lawfully permit the deceased to be carried on its train by virtue of the commission which was issued to him unless he was on duty, nevertheless the appellant, having received the deceased upon its train and permitted him to ride in the mail car, and by virtue of the commission undertook to transport him as a passenger regardless of the question whether he was or was not on duty, must be held responsible for the breach of duty so assumed and undertaken by it, to the same extent that it is liable to passengers for hire. On the other hand, it is asserted by the appellant that the respondents, having alleged in the complaint that the deceased was in effect a passenger for hire arising out of particular alleged facts—a contract between the government and the appellant to carry mails and mail clerks, including the deceased, for which appellant received and was paid compensation, and that under such arrangement, and for

such consideration, the appellant had undertaken to carry the deceased from Oakland to Ogden, that the deceased in the discharge of duties as a railway mail clerk was required to be in the mail cars operated by the appellant, and "was in said car with the knowledge and consent of the said defendant, its agents and servants, as such clerk, and in the discharge of duties as such" at the time of the derailment—must recover, if at all, upon proof of the particular relation of passenger and carrier as alleged, and that they cannot be permitted to recover on the theory that the deceased was a gratuitous or other passenger; that under the Hepburn act neither the appellant nor its agents in charge of its train could lawfully permit the deceased to ride on his commission when he was not on duty, nor could it or its agents otherwise lawfully permit him to ride gratuitously, and, since the deceased was riding on appellant's train by virtue of his commission when not on duty, he was engaged in the commission of an act in violation of law, and was hence a trespasser to whom appellant owed no duty except to refrain from willfully injuring him.

It undoubtedly is true that a plaintiff may not declare on one theory and recover on the proof of another. He may not for instance declare on one or several alleged acts of negligence, and recover on the proof of another or others. So, in a complaint, a plaintiff seeking to recover from a carrier for the negligent killing of a passenger, no recovery can be had unless the relation of carrier and passenger is shown, although the facts are such as to warrant a recovery in the absence of such relation for ordinary negligence in injuring a person not a passenger. The duty owing, the measure of liability, and the degree of care required are different. (*Chicago & E. I. R. Co. v. Jennings*, 190 Ill. 478, 60 N. E. 818, 54 L. R. A. 827.) If therefore, in the complaint a particular kind of passenger is alleged, may recovery be had on the proof of a different kind? That is, if in the complaint it is alleged that the passenger was one for hire, may recovery be had if the proof shows that he was a gratuitous passenger? The rule

at common law obtained, and, as stated in 1 Chitty on Pleadings, p. 392, that "if the plaintiff, though needlessly, describe a tort and the means adopted in effecting it with minuteness and particularity, and the proof substantially vary from the statement, there will be at fatal variance which will occasion a nonsuit." But by sections 3001, 3002, 3003, Comp. Laws 1907, it is by our Code provided:

"No variance between the allegations in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be amended, upon such terms as may be just.

"Where the variance is not material, as provided in the next preceding section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

"Where, however, the allegation of the claim or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance within the last two sections but a failure of proof."

In speaking of such codes, Mr. Bates, in his work on Pleading and Practice (volume 1, p. 512), says:

"Under the Code no variance is material unless it has actually misled the adverse party to his prejudice on the merits, and no allegation is material unless essential to the claim or defense. The evident object of the Code is to vest in the court a discretion, where it can be done without surprise or injury, to try the case on the evidence outside of the pleadings, and if objection be made to allow the pleadings to be conformed to the evidence at once and without terms, and where there is no objection to refuse to reverse on account of the variance."

Had respondents merely averred that the appellant was a common carrier of passengers, that the deceased was a passenger on one of its trains, and that it had assumed and undertaken to transport him as such, such allegations would have been sufficient to show the relation of passenger and carrier and the duties of a carrier owing by it to him, and any evidence would have been permissible thereunder which tended to show the relation of carrier and passenger, whether for hire or that of a gratuitous passenger. (*Birmingham Ry. Lt. & P. Co. v. Adams*, 146 Ala. 267, 40 South. 385,

119 Am. St. Rep. 27; *Lemon v. Chanslor*, 68 Mo. 340, 30 Am. Rep. 799; *Ohio & M. R. Co. v. Craucher*, 132 Ind. 275, 31 N. E. 941; *Gulf, Colo. & S. Fe. R. Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. Rep. 345; 2 Bates, Pl. & Pr. p. 1174.) In the case of *Gulf, Colo. & S. Fe. R. Co. v. Wilson*, *supra*, it was held that proof that plaintiff was a United States mail agent on defendant's car in charge of mail under an allegation that he was a passenger does not constitute a variance. Nor are such general averments of the relation of carrier and passenger, as stated, open to the objection that they are statements of mere conclusions. (*Ohio & M. R. Co. v. Craucher*, *supra*.) If the duties imposed by law for the carriage of a passenger for hire were other than or different from those imposed for the carriage of a gratuitous passenger, or if a different or higher degree of care was required in the one than in the other, it can readily be seen that no recovery could be had under an averment that the injured person was a passenger for hire on proof that he was a mere gratuitous passenger. But it is now well settled that there is no difference in the degree of care required of carriers, nor in the measure of liability, in the transportation of passengers for hire and gratuitous passengers. It was wholly unnecessary for respondents to aver with minuteness the particular facts as was done, upon or out of which the relation of carrier and passenger was based or grew. There must, of course, be sufficient averments and evidence to support a finding of the relation of carrier and passenger, else no recovery can be had. The essential in its general scope and meaning is the averment and proof of that relation. It undoubtedly was sufficiently averred in the complaint, and, though the evidence does not support the averment that the deceased was on the defendant's train in the discharge of duties pertaining to the railway mail service, and hence does not show that he was a passenger for hire, as was in effect averred, nevertheless it does support a finding of the relation of carrier and passenger; that is, the evidence does support a finding that the appellant received and accepted the deceased for the pur-

pose of being conveyed in the mail car from Ogden to Oakland and from Oakland to Ogden, and that it undertook to so transport him in virtue or by reason of the commission held by him.

The further question to be determined is whether such relation and appellant's undertaking to transport the deceased, and its alleged breach of duty resulting in his death, are so conclusively made to appear as to entitle the respondents to a directed verdict on such issues. If they were entitled to such a direction, then the errors committed by the trial court, and referred to in our opinion on the former hearing, are harmless. That the car was de- 12
railed through the negligence of appellant as alleged in the complaint, and that the deceased was killed by reason of such derailment, is, upon the record, not open to controversy. No substantial conflict is presented by the evidence on that subject. The serious question is: Does the evidence conclusively show the relation of carrier and passenger? On such question we think the following facts are conclusively made to appear: The deceased, who was a railway mail clerk in the service of the government of the United States, left Ogden and went to Oakland solely on account of the death of his child. He remained at Oakland a few days. When there, he went on board appellant's train on his return trip. When he left Ogden, he entered a mail car in appellant's train. The evidence of his right to enter the mail car and be carried by appellant was the commission issued to him, which, on its face, entitled him to transportation between all stations in Utah, Nevada, and California. The commission on its face granted "the facilities of free transportation on the lines named," regardless of the question whether he was or was not in the discharge of public duties. It was issued to him before the Hepburn act took effect. The derailment and the deceased's death occurred fourteen days after the act took effect. It was admitted by the parties on the trial that the deceased used the commission on the trip "as the evidence of his right to ride—the evidence of his right of transportation"—and that no question would

be raised with respect to the exhibition of the commission to the conductor in charge of the train. The deceased at Oakland, in the presence of the conductor and train agent, and with their knowledge, entered a mail car in a train about to leave for Ogden, and impliedly with their consent, at least without their objection. In view of the stipulation, and upon the whole record, we think the only permissible inferences are that the deceased, both in going to and in returning from Oakland, rode in the mail car with the knowledge and consent of appellant's conductors in charge of the train; that the appellant, its conductors and agents in charge of the train, and the deceased, in good faith, assumed and believed that the commission entitled him to so ride and to be transported in the mail car regardless of the fact whether he was or was not on duty, and that the commission was so treated and so recognized by them, and as "the evidence of his right of transportation." There is nothing in the record to support the allegations in the answer that the deceased entered the mail car without appellant's knowledge or consent, or against its will, or with the intent, or for the purpose, of deceiving or defrauding the appellant or the government, or that he otherwise entered the car clandestinely or fraudulently, or in bad faith, or with any wrongful design or purpose. The evidence, quite conclusively, shows the contrary. The deceased was therefore not a trespasser. To be a trespasser, it was essential that his presence on appellant's train was without its knowledge or consent, or was gained or obtained through fraud or deceit.

Now, what legal liability attaches for an injury inflicted upon one through the carrier's negligence in being transported under such circumstances? The appellant asserts not any, for the Hepburn act forbids such a transportation when the deceased was not on duty. Section 1, par. 4, of the act (34 Stat. 584; Fed. Stat. Ann. Supp. 1907, p. 169), is as follows: "No common carrier subject to the provisions of this act, shall, after January 1, 1907, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and

their families, its officers, agents, surgeons, physicians, attorneys at law; to minister of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals, and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the national homes or state homes for disabled volunteer soldiers, and of soldiers' and sailors' homes, including those about to enter and those returning home after discharge, and boards of managers of such homes; to necessary caretakers of live stock, poultry, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail service employees, postoffice inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks, and physicians and nurses attending such persons: Provided, that this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for such offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass or free transportation shall be subject to a like penalty." Before the passage of this act, it, of course, was lawful for a carrier to give free interstate transportation for passengers; and, while there is no direct evidence of it in the case, we think from what was made to appear in argument we may assume that, before this act took effect, commissions to railway mail service employees were

honored by carriers on the lines designated thereon, and such employees given the facilities of free transportation, whether on duty or not. And upon the record we think we are justified in assuming that after the act took effect, and at the time of the transportation in question, the appellant and the deceased in good faith believed that the provisions of the Hepburn act did not forbid a carrier from transporting a railway mail service employee, on his commission issued to him, and over the lines designated thereon, though he was not on duty. This assumption, of course, is wholly immaterial to the construction of the act, but it is important as bearing on the question whether the deceased was riding on the mail car with appellant's consent or against its will. In June, 1907, about five months after the derailment, in response to an inquiry made of them, the members of the Interstate Commerce Commission expressed their views that under the Hepburn act a carrier who knowingly permitted railway mail service employees to use, and that such employees who accepted, free transportation when not in the discharge of their public duties, and when traveling unofficially, and for their personal benefit or pleasure, would subject themselves to the penalties of that act. This conclusion was reached upon a classification of the persons enumerated in the exceptions of the act, and who might receive free transportation, into three groups: (1) The "persons actively connected with the operation of railroads or with the administration in various capacities of their affairs;" (2) the "persons who are either engaged in administering charities or are the object of charitable aid;" and (3) persons "who have to do with the affairs of persons, firms, or corporations, engaged in business along the line of railroads . . . and not in the employ of the railway companies." To those classified in the first and second groups, it is held by them, free interstate transportation may be given without offending the provisions of the act, though the transportation is wholly for their personal pleasure and benefit; but to those classified in the third group, free interstate transportation cannot lawfully be given to or received by them "except in connection

with the actual performance of duties, or on the return journey." Had this ruling been made as the result of some hearing or proceeding before the commission 13 involving the question, we might be inclined, though not required, to accept such a construction, even though it was not in accord with our own views. However, since it was a mere response in reply to a letter seeking the views of the members of the commission, apparently not upon an actual but a moot case, the ruling ought not be given the weight that otherwise should be given it had it been made under other circumstances. Notwithstanding the high regard entertained by us for the judgment of the members of the commission, we nevertheless are of the opinion that the construction placed by them on the Hepburn act in this regard is not the correct one. Congress, of course, could expect any persons it desired from the operation of the general provisions of the act forbidding the giving of 14, 15 free interstate transportation for passengers. It made such exceptions. It is generally recognized that an exception of a particular thing from the operation of the general words of a statute shows that in the opinion of the lawmaker the thing excepted would be within the general words had not the exception been made. Tested by this principle, had the exception in respect of railway mail service employees not been made, would the carriage of such employees on mail cars in the discharge of duties pertaining to the railway mail service be in violation of the general provisions of the act? We think not. It is generally held by the courts that "a mail agent or postal clerk employed and engaged in the service of the government and traveling in the postal or mail car, in charge of the mails, under a contract between the government and the carrier for the carriage of mail and the mail clerks having lawful custody thereof, is a passenger for hire to whom the carrier owes the same duty that it does to passengers riding upon the train, in so far as its liability for personal injuries arising from its negligence is concerned. The compensation for the carriage of such 16 agents or clerks must be regarded as included in that

paid by the government for the carriage of mails." (Moore on Carriers, p. 577.) Such carriage, under such circumstances, in no sense would be free transportation, but transportation for hire, paid for by the government. We cannot believe it was thought by Congress that, if the exception relating to railway mail service employees was not made, the carriage of such persons in charge of the mails in mail cars or engaged in duties pertaining to the railway mail service under a contract between the government and the carrier for the carriage of mails and mail clerks would, in any sense, be free transportation within the general words, and in violation of the general provision, of the act forbidding free interstate transportation. We think it manifest that something more and other than that was intended by such exception.

In the act is contained a number of exceptions. Some are without limitation or restriction; others are limited and restricted. Thus, "necessary caretakers of live stock," etc., "employees on sleeping cars," "newsboys on trains," and other exceptions specified in the act, having in themselves restrictive or qualifying terms. But in the exception "its (the carrier's) employees and their families, its officers, agents," etc., "ministers of religion," indigent persons, inmates of national or state homes, etc., are without terms of restriction or limitation. So is the exception as to "railway mail service employees, postoffice inspectors, custom inspectors, and immigration inspectors." We see no more license to read into this exception words of restriction or limitation than into the first, second, third, or fourth exceptions specified in the act. Because such words are more easily read into this exception than into the second, third, or fourth is no reason why they should be read into it. They can as readily be read into the first as into this exception. That is, the words "when on duty" can as readily be read into the exception pertaining to the carrier's employees as in the exception pertaining to railway mail service employees. The fact that the exception pertaining to "the employees on sleeping cars, express cars," is restricted and limited, and that the exception to "railway mail service employees" is not

restricted or limited, is, we think, significant, as bearing upon the intention that the former was intended to be restricted, and the latter not. If Congress intended the limitation or restriction to apply to both, such an intention could very easily have been expressed. We can see good reason why it was desired to restrict the one and not the other. We need not, however, speculate on that, for the intention to restrict the one and not the other is, we think, made manifest by the language employed. Furthermore, exceptions in penal statutes ought to be liberally construed in 17, 18 favor of him who is charged with the violation of the provisions of the statute. We are therefore of the opinion that the Hepburn act does not forbid a carrier from giving railway mail service employees free interstate transportation when not on duty and when traveling for their own benefit or pleasure.

Though the construction which we have given the Hepburn act should not be correct, and though it was unlawful for the appellant to give, and the deceased to receive, free transportation on his commission, when he was not on duty, yet we are also of the opinion that under all the circumstances of the case the appellant, having undertaken and assumed to carry and transport the deceased as a passenger by reason of the commission, cannot escape 19 liability for the consequences of its negligence on that ground. Moore, in his work on Carriers (page 570), says: "A person who travels upon a pass unlawfully issued to him in violation of a law prohibiting the issuing of free passes is not a trespasser, but is entitled to the rights of a passenger." The same principle is stated in 5 A. and E. Ency. Law (2d Ed.), p. 508. And to that effect are the following cases: *Bradburn v. Whatcom Co. Ry. & L. Co.*, 45 Wash. 583, 88 Pac. 1020, 14 L. R. A. [N. S.] 526; *Buffalo, etc., R. Co. v. O'Hara*, 3 Penny [Pa.] 190; *McNeill v. Durham & C. R. Co.*, 135 N. C. 682, 47 S. E. 765, 67 L. R. A. 227. In the last-named case numerous cases bearing on the subject are cited and reviewed. These cases proceed upon the theory, and, as stated by the court in the case of *Delaware, Lacka-*

wanna & Western R. Co. v. Trautwein, 52 N. J. Law, 169, 19 Atl. 178, 7 L. R. A. 435, 19 Am. St. Rep. 442, "that a railroad company having accepted a passenger is under an obligation to take due and reasonable care 20 for his safety, and that that obligation arises by implication of law, independent of contract. To give the plaintiff a standing in court to sue for the injury, she has no need of the aid of a contract which was illegal," and that the act of traveling on a pass forbidden by law is not the contributing cause of the injury. The principle involved is analogous to that applied where, by the weight of authority, it has been held that a carrier, having accepted one as a passenger violating a statute prohibiting travel on Sunday, owes to him "the same duty as if he were lawfully traveling, and is responsible for a failure to perform it, the same in the one case as in the other," and that "the gravamen of the action is the breach of the duty imposed by law upon the carrier of passengers to carry safely, so far as human skill and foresight can go, the persons it undertakes to carry. This duty exists independently of contract, and although there is no contract in a legal sense between the parties. Whether there is a contract to carry, or the service undertaken is gratuitous, an action on the case lies against the carrier for a negligent injury to a passenger. The law raises the duty out of regard for human life, and for the purpose of securing the utmost vigilance by carriers, in protecting those who have committed themselves to their hands." (*Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 17 Am. Rep. 221.)

We are aware some courts have held that "the relation between carrier and passenger is contractual and is created only by contract, express or implied" (*Farley v. Cincinnati H. & D. Co.*, 108 Fed. 14, 47 C. C. A. 156), upon which the conclusion may be based that if there is no valid contract of carriage, either express or implied, no relation of carrier and passenger is shown; and since the tort cannot be made to appear without proof of the illegal contract or transaction, on principle of public policy, a plaintiff who requires aid from an illegal transaction or contract to establish his de-

mand must fail. Ordinarily the relation of carrier and passenger is created by contract, either express or implied. But the relation may exist independent of any contract between the parties themselves. We think this is clearly shown by Mr. Justice Douglas in the case of *McNeill v. Durham & C. R. Co.*, *supra*. We think his conclusion is supported by the weight of authority that "the law imposes upon a common carrier certain duties and liabilities which adhere to the nature of his calling. We prefer to adopt the more direct expression, and say that those duties and liabilities are imposed by law upon common carriers upon consideration of public policy independent of contract, and arise from the nature of their public employment." The same principle is stated by the Maryland court in *State, to Use of Abell, v. Western Maryland R. Co.*, 63 Md. 433, that "the duty of the carrier to convey safely does not result from the consideration paid, but is imposed by law," and that "a common carrier who accepts a party to be carried owes to that party a duty to be careful, irrespective of contract." Moore, in his work on Carriers (page 568), says: "Although it was for a long time urged on behalf of the carrier that it was liable only on its contract, and consequently that the law imposed no duty upon it in the case of a gratuitous undertaking to carry a passenger, there being no consideration, and therefore no legal contract, express or implied, the courts finally held otherwise, and it is now well settled that the carrier owes a duty to all upon its vehicle, independent of contract, even when the service is gratuitous, and that the breach of this duty is negligence, for which it is liable to the same extent that it is liable to passengers who pay fare. The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it." In *Fetter on Carriers of Passengers*, sec. 220, it is said: "It is now well settled that a carrier by its acceptance of a passenger as a passenger comes under an obligation to take due and reasonable care for his safety, which obligation arises by implication of law, and independent of contract, so that it may exist though the contract of

carriage is illegal, or though there is no express contract of carriage." In Wharton's Law of Negligence, secs. 354, 355, it is said: "But there is now an almost uniform acquiescence in the true view that a person who undertakes to do a service for another is liable to such other person for want of due care and attention—the *diligentia* of the *bonus et diligens paterfamilias*—in the performance of the service, even though there is no consideration for such undertaking. . . . The carrier is bound from the time he assents thus to carry such person to exercise towards him the diligence, prudence, and skill of a good carrier in that particular kind of transport." The rule is stated by the English court in *Austin v. Great Western R. Co.*, L. R. 2 Q. B. 442, that "the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely."

It is unnecessary to further refer to the authorities or cases. We are of the opinion that, when a common carrier accepts a person as a passenger, he is not permitted to deny that he owes to him the duty of diligence, prudence, and skill, which as carrying on a public employment he owes to all his passengers, and that he cannot escape liability for a negligent performance of that duty resulting in injury by urging that the pass or commission was issued, or the gratuitous carriage permitted by him in violation of law. Though the gratuitous carriage of the deceased by the appellant should under all the circumstances be held to have been in violation of the Hepburn act, in the commission of which both the deceased and the appellant were in *pari delicto*, and alike subject to the penalties of that act, yet that wrong in no sense influenced, nor was it a contributing cause of the wrong or negligence of appellant resulting from its breach of duty imposed upon it by law and arising from the facts of its acceptance of the deceased as a passenger and its undertaking to carry him as such. Such duties were not dependent upon the particular kind of contract of carriage existing between

itself and the deceased, but upon the facts that it had accepted him as a passenger, and as such undertook to convey him. And we say here, as was said in the case of *Carroll v. Staten Island R. Co.*, *supra*, "this case, therefore, is not within the principle of many of the cases cited, which forbid recovery upon a contract made in respect to a matter prohibited by law, or for a cause of action which requires the proof of an illegal contract to support it." Mr. Justice Dixon, in the case of *Sutton v. Town of Wauwatosa*, 29 Wis. 21, 9 Am. Rep. 534, stated the proposition well when he said that "one party to the action, when called upon to answer for the consequences of his own wrongful act done to the other, cannot allege or reply the separate or distinct wrongful act of the other, done not to himself nor to his injury, and not necessarily connected with, or leading to, or causing or producing the wrongful act complained of," and that "himself guilty of a wrong, not dependent on nor caused by that charged against the plaintiff, but arising from his own voluntary act or his neglect, the defendant cannot assume the championship of public rights nor to prosecute the plaintiff as an offender against the laws of the state and thus to impose upon him a penalty many times greater than what those laws prescribe. Neither justice nor sound morals require this and it seems contrary to the dictates of both that such a defense should be allowed to prevail." For much stronger reasons should such principles be applied, when, as here, the defendant itself participated in the wrong charged against the deceased, the gratuitous carriage in violation of law. To permit the defense in such case is to allow the appellant to excuse itself or claim immunity from the consequences of its own tortious acts, negligently done to the deceased, on the ground that it and the deceased had been guilty of some other independent wrong, or violation of law, which in no sense influenced nor caused the tortious act of the appellant, and was not a contributing cause thereof, or of the injury, and bore no relation to either the cause or effect produced by it. We do not mean to say, and do not hold, that if it were only lawful for the deceased to have traveled on his

commission when he was in the discharge of his public duties, and unlawful for him to do so when he was not on duty, and if he, without the knowledge or consent of appellant or its agents in charge of the train, had made an unauthorized use of the commission by traveling thereon when he was not on duty, that the relation of carrier and passenger would have been created rendering the appellant liable as in the case of a breach of duty in negligently transporting a passenger. A mere intruder or trespasser, of course, cannot create the relation of carrier and passenger by his own act. Nor can one create such relation by fraudulently or deceitfully making an unauthorized use of a commission, pass, ticket, or the like, nor by otherwise gaining his presence on the train by fraud or deceit, or through collusion or connivance with mere train crews. The test is: Did the person desiring passage in good faith offer himself for the purpose of being carried as a passenger, and was 21 he as such accepted and received by the carrier and undertaken to be transported by it? If so, then the relation of carrier and passenger arises, and the law casts the duty on the carrier to convey him safely, and to exercise toward him "the diligence, prudence, and skill of a good carrier in that particular kind of transport," regardless or independent of any contract existing between them. Now, while it was alleged in the answer that the deceased wrongfully and fraudulently, and with the intent, and for the purpose, of deceiving the appellant, and without its knowledge or consent, and against its will, entered and remained in the mail car, there is no evidence justifying a finding of any such facts. Upon the record the case is reduced to the simple facts where the deceased, with the full knowledge and consent of the appellant, was permitted to travel in the mail car on the commission issued to and held by him. The commission was "the evidence of his right of transportation." Upon that the deceased offered himself to be carried, and upon that the appellant accepted and received him, and undertook to transport him. There are, therefore, no facts nor inferences to support the averments contained in the an-

swer, or to justify the submission of the case to the jury on such issues or theory. Upon the whole record, we are persuaded that on the question of appellant's liability the respondents were entitled to recover as a matter of law, and hence the errors referred to on the former hearing were non-prejudicial to the appellant. (*Madsen v. Utah Light & Ry. Co.*, 36 Utah, 528, 105 Pac. 709.)

Our former ruling reversing the judgment of the court below, and remanding the case for a new trial, is therefore set aside, and the judgment of the court below is now affirmed, with costs to respondents. It is so ordered.

FRICK and McCARTY, JJ., concur.

SCHUYLER et al. v. SOUTHERN PACIFIC
COMPANY.

No. 2034. Decided July 6, 1910. Further Rehearing Denied, August 1, 1910 (109 Pac. 1025).

1. **CARRIERS—INJURY TO PASSENGER—QUESTION FOR JURY.** Where plaintiff's decedent, an employee of defendant carrier, having a free pass, entered defendant's train, and was received as a passenger and permitted to ride, and there was no evidence that the employees of the train did not know that decedent was riding on a free pass or that they were deceived as to his status on the train, it was not error to fail to submit to the jury the question as to whether defendant's trainmen knew that decedent was riding on a free pass while not on duty. (Page 614.)
2. **APPEAL AND ERROR—PRESENTATION OF QUESTIONS IN TRIAL COURT—CHANGE OF THEORY.** Where appellant adopted a definite theory in the trial court as to the facts established by the evidence, he would not be permitted to change that theory on appeal and to assert that such facts were not established, and that he was entitled to a new trial. (Page 614.)
3. **APPEAL AND ERROR—REVIEW—QUESTIONS OF FACT.** While the appellate court will not pass on the weight of the evidence, it will not ignore self-evident conclusions from undisputed facts. (Page 615.)
4. **REMOVAL OF CAUSES—GROUNDS FOR REMOVAL—CONSTRUCTION OF PLEADINGS.** Where the Supreme Court construed the complaint in

an action against the carrier for the death of a passenger and held that it did not present a federal question under the Hepburn act (Act June 29, 1906, c. 3591, sec 1, par. 4, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1151]), as the complaint did not show on its face that deceased's right to transportation was derived from the federal statute, or that his cause of action was based on such statute, a further remark by the court that under the allegations of the complaint it did not constitute a fatal variance under the state statute for plaintiff to prove that deceased was a gratuitous passenger at the time of the accident was insufficient to negative the construction made by the court, and to introduce a federal question into the cause. (Page 615.)

Action by Mary R. Schuyler and others against the Southern Pacific Company.

On rehearing on appellant's application.

REHEARING DENIED.

For former opinion, see 37 Utah, 581.

FRICK, J.

The original opinion, as well as the one handed down on rehearing, is found in 37 Utah, 581, 109 Pac. 458-470. It will be seen by referring to the opinions there filed that in the second opinion we arrived at a result different from that arrived at in the first. In view of this appellant has filed a petition for a rehearing upon the second judgment in which it strenuously urges that the case should be remanded for a new trial. One of the points urged is that the question of whether the conductor in charge of appellant's train had knowledge that the deceased was traveling on his commission when he was not on duty was one of fact which was not, but should be, submitted to a jury. If there had been any evidence in the case to justify a finding that appellant's agents in charge of the train had no knowledge that the deceased was traveling on his commission when he was not on duty, and further that they accepted him as a passenger and permitted him to ride in the mail car on the commission only, in the belief that he was on duty and otherwise

would not have accepted him as a passenger or yielded their assent to his riding in the mail car on his commission, and further, had we held under the provisions of the Hepburn act that it was not lawful for the deceased to ride on his commission when he was not on duty, then there might be much force to appellant's position.

It, however, is clearly made to appear that the question of whether the deceased was on or off duty was not an element of, and did not enter into, the transaction. There is no evidence to justify a finding that had appellant's agents known that the deceased was not on duty, such fact in any particular would have influenced their action in permitting the deceased to ride in the mail car on his 1 commission. There is nothing to show that the deceased deceived appellant's agents who were in charge of the train by pretending that he was or inducing them to believe that he was in the discharge of duties, or that he deceived them or practiced any fraud on them in any other particular. Upon the whole record it is apparent, and as stated in our last opinion, that the deceased on his commission tendered himself as a passenger to be carried in appellant's mail car, and upon that commission appellant's agents received and accepted him to be so carried, regardless of the question whether he was on duty or not. Moreover, we think that the stipulation referred to in the last opinion is also to that effect.

What appellant contended for in the court below was that neither the appellant nor its agents could lawfully permit deceased to ride on the commission when he 2 was not on duty. That was appellant's position in the court below all through the case. From such position, nor from the undisputed facts, nor from the unavoidable inferences to be deduced therefrom, can either we or a jury relieve the appellant. The rule announced in *Wilkinson v. O. S. L. R. Co.*, 35 Utah, 110, 99 Pac. 471, by us applies here. We there said: "While we have no disposition to pass upon the weight of the evidence, and disclaim any right to do so, we nevertheless may not ignore self-evident conclusions

arising from undisputed facts." Under such circumstances, as in effect held in that case, a jury could at most excuse that which the law did not sanction. It seems palpable to us that in permitting the deceased to enter and ride upon appellant's train, whether he was there in one rather than another capacity, did not enter the minds of those who were in charge of it. If appellant, therefore, be now permitted to say that that question should enter into the consideration of the case, it would be tantamount to permitting a fact to be shown in excuse of its legal liability, which fact did not exist at the time of the transaction, and hence, in legal effect, would amount to permitting the case to be ruled or controlled by an immaterial issue. No one will seriously dispute that whether a certain fact is material or immaterial in view of all the circumstances and the other facts found or admitted in the case is purely a question of law. In any view, therefore, the conclusion reached in the last opinion handed down, and which is now assailed, is right and should prevail. 3

Counsel, however, likewise insist that because we held in the last opinion that the deceased did not come within the Hepburn act (Act June 29, 1906, chap. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1151]) therefore a federal question was involved; that this question now arises for the first time by reason of the fact that we have held that under the allegations of the complaint the respondents can recover upon the theory that the deceased was on the train as a gratuitous passenger. We considered the case from several view points. In one of them we undoubtedly construed and gave effect to a federal statute. However, from another view point the final result reached by us in the case was wholly independent of the federal statute. Cases sometimes arise in which state courts, during the course of the trial or proceeding, are required to deny certain rights claimed under a federal statute. When such a condition arises, a case, under peculiar circumstances, may be taken on a writ of error from a state court of last resort to the Supreme Court of the United States. Mr. Chief Justice Straup, in the first opin-

ion, clearly and correctly stated under what circumstances and conditions a case may be removed from a state to a federal court for trial. We repeat here that unless it be made to appear from the initial pleading filed by the plaintiff in an action that the case is one that may be removed to a federal court, it cannot be removed, notwithstanding that during the course of the trial or proceeding a federal question may arise for which a removal might have been had if it had appeared from the initial pleading and timely application for removal had been made. (Moon on the Removal of Causes, sec. 101.)

Nor is counsel's claim permissible that a federal question is now presented upon the face of the complaint because of the construction we gave to some of the allegations therein contained. What was said in that regard simply amounted to this: That under the allegations of the 4 complaint it did not constitute a material, hence not a fatal, variance under our statute, for respondent to prove that the deceased was a gratuitous passenger on appellant's train at the time of and preceding the accident. That such a ruling could change the complaint from one upon the face of which no removable question was presented to one where such a question was apparent is inconceivable to us.

We have given this case most thorough and painstaking attention. We are thoroughly convinced that the conclusions reached in the last opinion, in view of the undisputed facts, are in harmony with law, reason, and justice.

No reasons being shown in the last application for a rehearing why that judgment should not stand, the application for a rehearing is denied.

STRAUP, C. J., and McCARTY, J., concur.

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36. **SAME.** An order granting in part a motion to strike specified parts of a pleading held not prejudicial. *Gay v. Young Men's Consol. Co-op. Mercantile Inst.*, 280.
37. **CROSS ASSIGNMENTS OF ERROR—NECESSITY.** A question raised by appellees is not presented for review without a cross-assignment of error. *Le Vine v. Whitehouse*, 280.

38. **RIGHT TO ALLEGE ERROR—ERROR INDUCED BY PARTY COMPLAINING.** Where the jury could properly render a verdict for plaintiff by following either of conflicting instructions, defendant whose request induced the conflict and caused the error in its favor cannot complain of the conflict. *Pulos v. Denver & R. G. R. Co.*, 258.
39. **FORCIBLE ENTRY AND DETAINER—APPEAL.** An appeal in forcible entry and detainer not taken within the time prescribed will be dismissed. *Murphy v. Paumie*, 228.
40. **FORCIBLE ENTRY AND DETAINER—APPEAL.** An appeal in forcible entry and detainer not taken within the time prescribed will be dismissed. *Hunsaker v. Harris*, 226.
41. **SAME.** The time for taking proceedings on appeal in forcible entry and detainer held governed by Comp. Laws 1907, Secs. 3586, 3587, and not by section 3301. *Hunsaker v. Harris*, 226.
42. **HARMLESS ERROR—SUSTAINING DEMURRER.** The sustaining of a general demurrer to a complaint, which stated a good cause of action against one not a party, held not prejudicial error. *Arnold v. Pope*, 204.
43. **QUESTIONS PRESENTED IN TRIAL COURT—CHANGE OF OBJECTION ON APPEAL—DIRECTION OF VERDICT.** Where a motion for a directed verdict in the lower court was grounded upon the insufficiency of defendant's evidence to show legal justification for seizure and sale of property for taxes, error in refusing to direct a verdict could not be assigned on the ground that the delinquent tax list was not published according to law. *Bown v. Owens*, 117.
44. **HARMLESS ERROR—CORRECT VERDICT.** Where a verdict for defendant was the only verdict which could have been rendered, erroneous rulings would not be prejudicial. *Bown v. Owens*, 117.
45. **FINDINGS OF FACT—ULTIMATE FACTS BINDING.** A finding of the ultimate fact of payment held binding on the appellate court, notwithstanding a finding of probative facts. *Sierra Nevada Lumber Co. v. McCormick*, 150.
46. **JUDGMENT—PRESUMPTIONS AS TO CORRECTNESS.** The judgment is presumed to be correct, unless the contrary appears from the record. *Sierra Nevada Lumber Co. v. McCormick*, 150.
47. **ORDERS REVIEWABLE—BILL OF EXCEPTIONS.** An order vacating a motion to substitute for a deceased party her administrator, and denying a motion to modify the judgment rendered, held not reviewable in the absence of a bill of exceptions. *McCullough v. McCullough*, 148.

BANKS AND BANKING,

- PLEADINGS—ISSUE RAISED.** In a depositor's action against a bank for money claimed to have been deposited and not checked out, held that the only issue made by the pleadings was whether defendant had paid to plaintiff or his order the sum stated. *Fee v. National Bank of the Republic*, 28.

BOUNDARIES.

1. **ESTABLISHMENT—ESTOPPEL.** A vendor *held* estopped to assert that a boundary established by a survey had by the vendee with the vendor's knowledge was not correct. *Horton v. Roghaar, 298.*
2. **ACQUIESCENCE—EFFECT.** A deed of a part of a lot in a block of a designated survey *held* to make the south line of the tract conveyed, the south line of the lot as established by acquiescence. *Young v. Hyland, 229.*
3. **SAME.** A boundary line recognized and acquiesced in by the owners of adjoining lands *held* conclusive on them and their grantees. *Young v. Hyland, 229.*
4. **SAME.** Where a boundary is open and visible, marked by monuments, fences, or buildings, and is knowingly acquiesced in for a long time, the law will imply an agreement fixing the boundary as located and will not permit the parties or their grantees to depart from such line. *Young v. Hyland, 229.*
5. **SAME.** Practical location of a boundary line may be established either by an express agreement or by acquiescence without surveys, either before or after an official survey. *Young v. Hyland, 229.*
6. **SAME.** A boundary line agreed on or acquiesced in for many years by the adjoining landowners *held* the boundary line as between them and their grantees. *Young v. Hyland, 229.*
7. **ESTOPPED BY ACQUIESCENCE—PERSONS ESTOPPED—HEIRS.** An heir would be estopped by his ancestor's acquiescence in an agreement with an adjoining landowner as to their boundaries, if the ancestor himself would be estopped. *Rydalch v. Anderson, 99.*
8. **SAME—EFFECT OF SUBSEQUENT ACTS OF PARTIES.** An agreement between predecessors of the parties fixing the boundary line different from that subsequently established by the section line afterwards surveyed, which agreement was acquiesced in by the parties thereto and their predecessors for a long period, *held* to estop plaintiff from claiming title to a tract which, according to the boundary fixed by the predecessors, belonged to defendant. *Rydalch v. Anderson, 99.*
9. **SAME.** Whether one is estopped from claiming land beyond an agreed boundary acquiesced in by him must be decided largely upon the particular facts of the case and no absolute rule can be applied to every case. *Rydalch v. Anderson, 99.*
10. **ACQUIESCENCE IN—RESURVEYS.** Boundaries to land established by prior official surveys and by fences and walls long acknowledged by the owners as marking the boundaries *held* to prevail over boundaries fixed by subsequent official resurvey. *Moyer v. Langton, 9.*
11. **SAME.** Practical location of boundaries acquiesced in for a long period of years will not be disturbed. *Moyer v. Langton, 9.*

CARRIERS.

1. **INJURY TO PASSENGER—QUESTION FOR JURY.** Evidence *held* insufficient to present a question for the jury as to whether the

servants of a carrier knew that a passenger was riding on a free pass. *Schuyler v. Southern Pac. Co.*, 612.

2. **PASSENGERS—WHO ARE—EVIDENCE.** In an action against a carrier to recover for the death of a railway mail clerk, evidence held insufficient to support a finding that at the time of the accident in which decedent was killed decedent was on defendant's train in the discharge of duties pertaining to the railway mail service. *Schuyler v. Southern Pac. Co.*, 581.
3. **INJURIES TO PASSENGERS—FREE TRANSPORTATION—VIOLATION OF STATUTE.** An interstate carrier held not entitled to avoid liability for negligence resulting in the death of an employee of the railway mail service while not on duty by alleging that such employee was riding on a free pass issued in violation of the Hepburn Act (Act June 29, 1906, c. 3591, Sec. 1, par. 4, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1151]). *Schuyler v. Southern Pac. Co.*, 581.
4. **NEGLIGENCE—DAMAGES—TRESPASSERS.** In an action against a carrier to recover for the death of one alleged to have been a passenger, there can be no recovery on the ground of ordinary negligence of defendant in injuring a person not a passenger. *Schuyler v. Southern Pac. Co.*, 581.
5. **SAME. PLEADING AND PROOF—"MATERIAL VARIANCE."** In an action against a carrier for the death of a mail clerk, a variance between the pleadings and proof held not material under Comp. Laws 1907, Secs. 3001-3003. *Schuyler v. Southern Pac. Co.*, 581.
6. **SAME. QUESTION FOR JURY.** In an action against a carrier to recover for the death of a railway mail clerk, evidence held to conclusively show that decedent at the time of his death was rightfully on defendant's train so as to warrant the direction of a verdict in favor of plaintiff on the issue as to whether or not he was a trespasser on the train. *Schuyler v. Southern Pac. Co.*, 581.
7. **REGULATION—FREE TRANSPORTATION.** Congress may, in prohibiting interstate carriers from issuing free transportation, except such persons from the operation of the general prohibition as it may see fit. *Schuyler v. Southern Pac. Co.*, 581.
8. **SAME.** The Hepburn act (Act June 29, 1906, c. 3591, Sec. 1, par. 4, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1151]) held not to prohibit an interstate carrier from issuing free transportation to employees of railway mail service while not on duty. *Schuyler v. Southern Pac. Co.*, 581.
9. **PASSENGERS—WHO ARE.** The relation of carrier and passenger may exist independent of any contract between the parties for transportation. *Schuyler v. Southern Pac. Co.*, 581.
10. **SAME.** The test in determining who are passengers is whether the person desiring passage in good faith offered himself for the purpose of being carried as a passenger, and that he was as such accepted and received by the carrier who undertook to transport him. *Schuyler v. Southern Pac. Co.*, 581.
11. **SAME. FREE TRANSPORTATION—"PASSENGERS FOR HIRE."** Employees of the railway mail service, traveling in the postal or mail cars in charge of the mails under a contract between the govern-

ment and the carrier for the carriage of mail, and mail clerks, are passengers for hire, to whom the carrier owes the same duty that it owes to the passengers riding upon the train in so far as its liability for personal injuries arising from its negligence is concerned. *Schuyler v. Southern Pac. Co.*, 581.

12. **PASSENGERS—WHO ARE—BURDEN OF PROOF.** In an action for the death of a railway mail clerk, the burden of proving that deceased was in the pursuit of his official duties at the time of the accident in which he was killed is on plaintiff. *Schuyler v. Southern Pac. Co.*, 581.

CASES.

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CERTIORARI.

REVIEW OF VOID ORDER. Certiorari held to lie to review an order recalling a special execution. *State v. District Court in and for Third Judicial Dist.*, 418.

CHATTEL MORTGAGES.

DISTINGUISHED FROM CONDITIONAL SALE. Certain instruments held a contract of conditional sale, and not a chattel mortgage, and not invalid as to the buyer's creditors for failure to comply with Comp. Laws 1907, Sec. 150, subds. 2, 3, relating to chattel mortgages. *Passow v. Emery*, 49.

CLERKS OF COURTS.

1. **COMPENSATION—LIMITATION OF EMOLUMENTS—FEES IN NATURALIZATION PROCEEDINGS.** The principle that the incumbent of a public office must discharge the duties thereof for the compensation fixed by law held not to prevent the clerk of a state district court performing services in naturalization proceedings under Act Cong. June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1909, p. 97), from retaining the fees as therein provided. *Eldredge v. Salt Lake County*, 188.
2. **ACCOUNTING FOR FEES IN NATURALIZATION PROCEEDINGS.** The compensation received by the clerk of a state district court in naturalization proceedings under naturalization act (Act Cong. June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. 1909, p. 97]) held not compensation for extra official services, and he need not account therefor to the county, notwithstanding Const. art. 21, Secs. 1, 2, and Comp. Laws 1907, Secs. 2057, 2062. *Eldredge v. Salt Lake County*, 188.

CONTRACTS.

1. **OPTION CONTRACTS—MODIFICATION—EFFECT.** A modification of an executory contract held, in legal effect, the entering into of a new contract. *Lochwitz v. Pine Trees Min. & Mill. Co.*, 549.
2. **RESCISSION FOR FRAUD.** A party who has been induced to enter into a contract by false and fraudulent representations may rescind on discovery thereof. *Le Vine v. Whitehouse*, 260.
3. **SAME.** A defrauded party will generally lose his right to rescind if he takes any benefit or does any other act implying intent to abide by or affirm the contract after he becomes aware of the fraud. *Le Vine v. Whitehouse*, 260.
4. **SAME.** A party misled must, as soon as he learns the truth and discovers the falsity of statements relied on, disaffirm with all reasonable diligence. *Le Vine v. Whitehouse*, 260.
5. **STIPULATIONS OF WAIVER.** A waiver of performance of stipulations of a contract must be pleaded to be available. *Neuberger v. Robbins*, 197.
6. **CONSTRUCTION—INTENT.** The primary object in the construction of a contract is to discover the intent of the parties from a consideration of the whole contract. *Caine v. Hagenbarth*, 69.
7. **EQUITABLE PREVAILS AGAINST UNCONSCIONABLE.** Where a written contract is susceptible of two constructions, one equitable

and the other unconscionable, the former will prevail. *Caine v. Hagenbarth*, 69.

8. **MODIFICATION OF CORPORATE OFFICERS.** The president of a corporation *held* without authority to extend the time for a payment provided for in a contract executed by him and the secretary pursuant to the authority of a board of directors. *Lochwitz v. Pine Tree Min. & Mill. Co.*, 549.

CORPORATIONS.

1. **LIABILITY OF SUBSCRIBERS.** Liability of subscribers to capital stock of corporation stated, under Const. art. 12, Secs. 5, 11, and Comp. Laws 1907, Secs. 316, 331, 432. *Rolapp v. Ogden & N. W. R. Co.*, 540.
2. **FICTITIOUS INCREASE OF INDEBTEDNESS.** Indebtedness of a corporation incurred for less than full consideration *held* fictitious increase of indebtedness, within Const. art. 12, Sec. 5. *Rolapp v. Ogden & N. W. R. Co.*, 540.
3. **SAME.** An issue of bonds *held* a fictitious issue of indebtedness, void under Const. art. 12, Sec. 11. *Rolapp v. Ogden & N. W. R. Co.*, 540.
4. **SUBSCRIPTION TO STOCK APPLICATION.** Any arrangement by which the subscriptions of stockholders to the stock in a corporation are diverted from their legal purpose as a fund for benefit of creditors of the corporation is void, as against public policy. *Rolapp v. Ogden & N. W. R. Co.*, 540.
5. **MORTGAGE TO DIRECTOR.** There being no fraud in securing by mortgage a debt paid by a corporate director, *held* that the mortgage is valid. *Kurts v. Ogden Canyon Sanitarium Co.*, 515.
6. **SAME—DEBTS SECURED.** A corporate note made subsequent to a note and transfer of a trust deed as collateral, pursuant to a corporate resolution, *held* not covered by the trust deed. *Kurts v. Ogden Canyon Sanitarium Co.*, 515.
7. **SAME—FORECLOSURE OF TRUST DEED—PARTIES PLAINTIFF.** Where corporate bonds and deed of trust were never actually negotiated, nor delivered for the purpose for which they were executed, but the deed subsequently became operative as security for a corporate debt with which the trustee had no connection, such trustee is not a proper party plaintiff to sue for the foreclosure of the trust deed. *Kurts v. Ogden Canyon Sanitarium Co.*, 515.
8. **SAME.** The payee of a corporate note *held* authorized to sue for the foreclosure of a collateral trust deed. *Kurts v. Ogden Canyon Sanitarium Co.*, 515.
9. **INSOLVENCY—EVIDENCE OF INSOLVENCY.** That a corporation is found to be insolvent at the time its mortgage is foreclosed does not show that it was insolvent at the time the mortgage was given. *Kurts v. Ogden Canyon Sanitarium Co.*, 515.
10. **SAME—PREFERENCE TO DIRECTORS.** Where a corporation received the exclusive benefit of the money borrowed for it on the indorsement of one of its directors, a corporate mortgage given to secure the estate of such director, who paid the debt, is not a giving of an unlawful preference to a corporate director. *Kurts v. Ogden Canyon Sanitarium Co.*, 515.

11. OFFICERS—BOARD OF DIRECTORS—QUORUM. Under Comp. Laws 1907, Secs. 315, 324, a quorum of the board of directors of a corporation *held* required to act as a unit when discharging or authorizing any one to execute corporate powers. *Lochwitz v. Pine Tree Min. & Mill. Co.*, 349.
12. OFFICERS—POWERS OF PRESIDENT. Under Comp. Laws 1907, Secs. 315, 324, the president of a corporation *held* to possess only the powers of a director, or such as may be directly conferred on him by the board of directors. *Lochwitz v. Pine Tree Min. & Mill. Co.*, 349.
13. OFFICERS—POWERS. The president of a corporation *held* without authority to extend the time for a payment provided for in a contract executed by him and the secretary pursuant to the authority of the board of directors. *Lochwitz v. Pine Tree Min. & Mill. Co.*, 349.
14. RATIFICATION OF UNAUTHORIZED ACT. A modification of a contract made by the president of a corporation *held* not ratified so as to be binding on the corporation. *Lochwitz v. Pine Tree Min. & Mill. Co.*, 349.
15. SAME. A ratification by a corporation of an unauthorized act of its officers must be effected in the same manner as is required by the exercise of the original power. *Lochwitz v. Pine Tree Min. & Mill. Co.*, 349.
16. MEETINGS OF DIRECTORS—POWERS OF MAJORITY. Under Comp. Laws 1907, Sec. 324, a corporation exercises its powers through the board of directors, and a majority of the board, regularly convened, may exercise any corporate powers. *Gay v. Young Men's Consol. Co-op. Mercantile Inst.*, 280.
17. BOARD OF DIRECTORS—NOTICE OF PROCEEDINGS. The minority of the board of directors of a corporation *held* chargeable with knowledge of the act of the majority acquiring property in trust. *Gay v. Young Men's Consol. Co-op. Mercantile Inst.*, 280.
18. SAME. The minority members of the board of directors of a corporation are chargeable with knowledge of legal corporate acts, whether the majority of the board directly exercise the corporate power or authorize an agent to do so. *Gay v. Young Men's Consol. Co-op. Mercantile Inst.*, 280.
19. STOCKHOLDERS—INSPECTION OF CORPORATE BOOKS—ENFORCEMENT OF RIGHT. A finding in an action to require the allowance of inspection of corporate books *held* not supported by the evidence. *State v. Silver King, Consol. Mining Co. of Utah*, 62.
20. SAME. Certain evidence as to whether plaintiff wished to learn the names of corporate stockholders *held* irrelevant under the issues made. *State v. Silver King Consol. Mining Co. of Utah*, 62.
21. SAME. Under Comp. Laws 1907, Sec. 329, a corporate stockholder has the right to inspect the corporate books to ascertain the names of the other stockholders, in absence of any reason for denying such right. *State v. Silver King Consol. Mining Co. of Utah*, 62.

22. **OPTION TO PURCHASE—CONDITION.** Defendant's liability to pay plaintiff the balance of a consideration for an assignment of an option to purchase a mine *held* conditional on defendant's election to take up the option. *Caine v. Hagenbarth*, 69.
23. **SPECIFIC PERFORMANCE—MUTUALITY OF OBLIGATION.** A contract sought to be enforced *held* not to lack mutuality of obligation. *Le Vine v. Whitehouse*, 260.
24. **SAME.** Contracts of the kind referred to in Comp. Laws, 1907, Secs. 2463, 2467, to be binding and enforceable, need be signed by vendor only, and specific performance will not be denied for lack of mutuality because not signed by the purchaser. *Le Vine v. Whitehouse*, 260.
25. **KEEPING TENDER GOOD—NECESSITY.** Plaintiffs suing for specific performance *held* entitled to prevail without a tender into court. *Le Vine v. Whitehouse*, 260.
26. **RECIPROCAL DEMANDS—CONDITIONAL DECREE.** Where there are reciprocal demands, and anything remains to be done by one obtaining a decree, which, in equity and good conscience, he ought to do, the court may, and usually does, make the decree conditional that, in case of non-performance, the petition will be dismissed. *Le Vine v. Whitehouse*, 260.

COURTS.

1. **STARE DECISIS—OPERATION OF DOCTRINE.** Where the specific ground of estoppel is alleged in an action and passed upon, the decision is not a ruling on all other grounds of estoppel, so as to be *stare decisis* of such grounds. *Hilton v. Sloan*, 359.
2. **NATURALIZATION.** The federal government in authorizing state courts to act in naturalization proceedings selects such courts and the clerks thereof as government agencies, through whom the government is discharging a function of sovereignty. *Eldredge v. Salt Lake County*, 188.

CREDITORS' SUIT.

RIGHT TO REMEDY. Ordinarily, a judgment creditor before he can invoke equity in aid of his judgment must allege that he has exhausted his legal remedies. *Rolapp v. Ogden & N. W. R. Co.*, 540.

CRIMINAL LAW.

1. **NEW TRIAL—DISCRETION OF COURT.** In granting or refusing motions for new trials, discretion is vested in the trial courts. *State v. Montgomery*, 515.
2. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE.** On a motion for a new trial newly discovered evidence *held* cumulative. *State v. Montgomery*, 515.
3. **SAME—PRESUMPTION.** On motion for a new trial, newly discovered evidence *held* not so conclusive in its character as to raise a reasonable presumption that the result of a second trial would be different from the first. *State v. Montgomery*, 515.

4. **SAME.** Newly discovered evidence on a motion for a new trial *held* required to be such as would probably change the result. *State v. Montgomery, 515.*
5. **APPEAL AND ERROR—POWER OF APPELLATE COURT.** The appellate court may not usurp the functions of trial courts in exercising their discretion on a motion for a new trial, in granting or refusing motions for new trials. *State v. Montgomery, 515.*
6. **SAME.** Where there is substantial evidence to support a verdict the appellate court cannot interfere with it. *State v. Montgomery, 515.*
7. **EMBEZZLEMENT—AUTHORITY OF AGENT.** Where accused demanded and received the money appropriated as his employer's agent, and it was paid in the discharge of obligations under advertising contracts which he had solicited for his employer, he was guilty of embezzlement, though he did not have authority to collect money due under such contracts. *State v. Gibson, 330.*
8. **CITY ORDINANCES—POLICE POWER.** The legislature can confer police power upon a city over subjects included within existing statutes and authorize it to prohibit and punish by ordinance acts which are also prohibited and punishable by the statute. *Salt Lake City v. Howe, 170.*
9. **LARCENY—EMBEZZLEMENT.** The wrongful appropriation of two hundred and thirty-five dollars by accused *held* a single embezzlement of that amount so as to make him punishable as for grand larceny, under Comp. Laws 1907, sections 4384, 4359, 4360, though forty-eight dollars was the largest amount received at any time from one person. *State v. Gibson, 330.*

DEATH.

1. **DAMAGES—ADMISSIBILITY OF EVIDENCE OF DISPOSITION OF DECEASED.** In a death action, evidence of decedent's disposition and deportment towards his wife and children *held* admissible on the amount of damages, under Comp. Laws 1907, section 2912. *Evans v. Oregon Short Line R. Co., 431.*
2. **COMPETENCY OF EVIDENCE.** Certain facts *held* not to affect the competency of testimony in a death action, but merely to go to its weight. *Evans v. Oregon Short Line R. Co., 431.*
3. **SAME—ADMISSIBILITY OF EVIDENCE OF PHYSICAL CONDITION OF DECEASED.** Evidence as to the physical condition of decedent's wife in a death action *held* to refer to a time prior to decedent's death. *Evans v. Oregon Short Line R. Co., 431.*
4. **SAME.** In a death action under Comp. Laws 1907, section 2912, certain evidence *held* admissible on the question of damages. *Evans v. Oregon Short Line R. Co., 431.*
5. **MEASURE OF DAMAGES—CONTRIBUTIONS OF DECEDENT TO FAMILY SUPPORT.** If the measure of a recovery in a death action be based upon the present value of what decedent would probably have contributed to his family had he lived, the discount should be made only from the time when such contributions would have been actually made. *Evans v. Oregon Short Line R. Co., 431.*

DESCENT AND DISTRIBUTION.

MORTGAGES—FORECLOSURE—PARTIES PLAINTIFF. A distributee of a decedent's estate who was appointed in the order of distribution as trustee for the other heirs *held* a proper party plaintiff to foreclose a trust deed payable to decedent's estate. *Kurtz v. Ogden Canyon Sanitarium Co.*, 313.

DISMISSAL AND NONSUIT.

ESTOPPEL—SUBSTITUTION OF PARTIES. In an action for wrongful death, defendant *held* estopped to demand a dismissal on the ground that one party plaintiff had been substituted for another. *Sargent v. Union Fuel Co.*, 392.

DOWER.

1. **ACTIONS TO ESTABLISH—BURDEN OF PROOF—MARRIAGE.** In an action for dower, the burden is upon the widow to establish a valid marriage; the validity of her marriage being put in issue. *Hilton v. Snyder*, 384.
2. **FINDINGS—NEGATIVE FINDINGS—SUFFICIENT.** In an action for dower, a finding *held* in effect a negative finding, and is sufficient to support a judgment for defendant on that ground. *Hilton v. Snyder*, 384.
3. **NATURE OF RIGHT.** Dower is merely an inchoate right which may never become a vested interest. *Hilton v. Sloan*, 359.
4. **AS AGAINST BONA FIDE PURCHASERS.** Ordinarily a claim of dower cannot be defeated by a claim of a bona fide purchaser of the land. *Hilton v. Sloan*, 359.
5. **ESTOPPEL TO CLAIM.** Complainant who was divorced from her husband by an invalid church divorce, and afterwards remarried, *held* estopped from claiming dower in land conveyed by her husband to bona fide purchasers after their alleged divorce. *Hilton v. Sloan*, 359.
6. **REPRESENTATIONS OF HUSBAND TO BONA FIDE PURCHASERS.** The wife's right to dower is not affected by the husband's representations upon selling the land that he is unmarried, unless she permits innocent persons to deal with him in good faith as an unmarried man with actual or constructive knowledge of his representations. *Hilton v. Sloan*, 359.

EASEMENT.

IN PUBLIC STREET. Where defendant had merely an easement in a street for maintaining a flume for mill purposes, he could acquire no more than the perpetual right to maintain the flume in the street for those purposes, and could not claim, by adverse possession, the legal title of that part of the street so as to enable him to maintain the flume banks at any height. *Hague v. Juab County Mill & Elevator Co.*, 290.

ESTOPPEL.

1. **STARE DECISIS.** Where the specific ground of an estoppel is alleged in an action and passed upon, the decision is not a ruling on all other grounds of estoppel so as to be *stare decisis* of such grounds. *Hilton v. Sloan*, 359.

2. **BOUNDARY LINE—ACQUIESCENCE.** An heir would be estopped by his ancestor's acquiescence in an agreement with an adjoining land owner as to their boundaries if the ancestor, himself, would be estopped. *Rydalch v. Anderson*, 99.
3. **BOUNDARIES—ESTABLISHMENT OF.** A vendor *held* estopped to assert that a boundary established by a survey had by the vendee with the vendor's knowledge was not correct. *Horton v. Roghaar*, 298.
4. **DOWER—DEFENSE—TO CLAIM OF.** In view of Const. art. 8, section 19 an equitable estoppel may be pleaded as a defense in a legal action for dower. *Hilton v. Sloan*, 359.
5. **DOWER—BONA FIDE PURCHASERS.** Complainant who was divorced from her husband by an invalid church divorce, and afterwards re-married, *held* estopped from claiming dower in land conveyed by her husband to bona fide purchasers after their alleged divorce. *Hilton v. Sloan*, 359.
6. **EQUITABLE ESTOPPEL—NATURE OF DOCTRINE—"ESTOPPEL IN PAIS."** The doctrine of estoppel *in pais* is an equitable doctrine originally applied to prevent an advantage to be taken of strict legal rights, and the equities of the particular facts must control in applying it. *Hilton v. Sloan*, 354.
7. **KNOWLEDGE OF FACTS—NECESSITY.** In order to be estopped, one need not in every case know the truth concerning material facts or intend to deceive the person injured, if, under the circumstances, he had a reasonable means of ascertaining such facts. *Hilton v. Sloan*, 359.
8. **EQUITABLE ESTOPPEL—WHO IS TO SUSTAIN LOSS.** When one of two innocent purchasers must suffer by the acts of a third person, he who has enabled the latter to cause a loss must sustain it. *Hilton v. Sloan*, 359.
9. **SAME—SILENCE.** Inaction or silence may under some circumstances amount to a misrepresentation and concealment of the true facts, so as to raise an equitable estoppel. *Hilton v. Sloan*, 359.
10. **SAME—PERSONS ENTITLED TO INVOKE.** One purchasing land from another who was entitled to invoke an estoppel as against claimants thereto may himself rely on the estoppel, though he had knowledge of facts when purchasing which would have prevented his grantor from invoking the estoppel had the latter known them. *Hilton v. Sloan*, 359.

EVIDENCE.

1. **DECLARATIONS AS "Res Gestae."** Test of declarations as *res gestae*, stated. *Cromeenes v. San Pedro, L. A. & S. L. R. Co.*, 475.
2. **SAME.** In an action for death of a boy killed by a train running along a street, *held*, that the court did not err in admitting as *res gestae* what a witness said to the engineer soon after the accident. *Cromeenes v. San Pedro, L. A. & S. L. R. Co.*, 475.
3. **BURDEN OF PROOF.** An evidentiary showing, however strong, made by a party having the affirmative of an issue, whether by

direct evidence of the witnesses or indirect evidence of inferences and presumptions, does not cast the burden on the other party to prove the negative, but the burden of proof in either case remains throughout with him who has the affirmative. *Schuyler v. Southern Pac. Co.*, 581.

4. **PRESUMPTION—PLACE OF ABODE.** The presumption that a man's place of abode is where his family lives is one of fact, which may be overcome by evidence. *Grant v. Lawrence*, 460.
5. **JUDICIAL NOTICE—OPENING OF PUBLIC LANDS.** Rule of judicial notice respecting public domain stated. *Sowards v. Meagher*, 212.
6. **SAME—ACTS OF CONGRESS.** Judicial notice is taken of an act of Congress restoring Indian reserved lands to the public domain. *Sowards v. Meagher*, 212.
7. **PAROLE EVIDENCE—VARYING WRITTEN AGREEMENT.** An oral agreement contemporaneous with a note and mortgage held not admissible to show that they were paid to be in merchandise. *McCornick v. Levy*, 134.
8. **CONSTRUCTION OF CONTRACT.** An assignment of an option to purchase a mine held not so plain and unambiguous as to preclude the admission of extrinsic evidence to aid the court in its construction. *Caine v. Hagenbarth*, 69.
9. **IRRELEVANT—CREATES NO ISSUE.** The mere fact that the court permitted irrelevant evidence could not create an issue where none was presented by the pleadings. *State v. Silver King Consol. Mining Co. of Utah*, 62.
10. **SELF-EVIDENT CONCLUSIONS—CONSIDERATION OF ON APPEAL.** While the appellate court will not pass on the weight of the evidence, it will not ignore self-evident conclusions from undisputed facts. *Schuyler v. Southern Pac. Co.*, 612.
11. **WHEN ADVERSELY ADMITTED.** When the court knows what a witness will answer, and then overrules the objection to the question, it must be held that the testimony was admitted adversely, and a motion to strike it out is unnecessary to present the objection for review. *Cromeenes v. San Pedro, L. A. & S. L. R. R. Co.*, 475.
12. **DEATH ACTION—CHARACTER OF DECEDENT.** In a death action, evidence of decedent's disposition and deportment towards the wife and children held admissible on the amount of damages, under Comp. Laws 1907, section 2912. *Evans v. Oregon Short Line R. Co.*, 431.
13. **MASTER AND SERVANT.** In an action for death of a miner by rock falling from the roof, evidence that earth and rock had fallen from the roof prior to the accident and at other places held admissible. *Sargent v. Union Fuel Co.*, 392.
14. **PROOF OF MARRIAGE.** A judgment in an action to recover dower in land purchased from the husband, in which the widow's marriage was in issue and established, is not admissible in a subsequent proceeding against strangers to that judgment to prove the marriage. *Hilton v. Snyder*, 384.

EXCEPTIONS, BILL OF.

1. **EXHIBITS.** Under Comp. Laws 1907, section 3284, *held*, a bill of exceptions sufficiently identified instruments in evidence. *Bingham Livery & Transfer Co. v. McDonald*, 457.
2. **SAME.** A bill of exceptions *held* to sufficiently identify a map as the one admitted in evidence. *Bingham Livery & Transfer Co. v. McDonald*, 457.

EXEMPTIONS.

1. **LAPSED EXEMPTIONS.** That a judgment for damages for wrongfully levying upon exempt property was also exempt when rendered would not prevent a judgment against the person, in whose favor the exempt judgment was rendered, from being set off against such judgment, after it and the claim on which it was based and had ceased to be exempt by the owner leaving the state. *Snow v. West*, 528.
2. **PROPERTY EXEMPTED—JUDGMENTS.** Under Comp. Laws 1907, section 3244, a judgment for the value of exempt property wrongfully sold under execution is also exempt. *Snow v. West*, 528.
3. **RIGHTS OF ASSIGNEE.** In view of Comp. Laws 1907, section 3247, one to whom a claim was assigned *held* not entitled to contend that the judgment rendered thereon was exempt, where the assignor left the state before the assignment, so as to himself lose his right of exemption as to the claim or judgment. *Snow v. West*, 528.

EXECUTION.

1. **WHO MAY INTERVENE—TO QUASH.** The rule as to persons who may intervene by motion to secure the quashing of an execution stated. *State v. District Court in and for Third Judicial Dist.*, 418.
2. **ORDER OF SALE—RECALL OF EXECUTION.** The recall of a special execution issued on an order of sale in attachment, under Comp. Laws 1907, sections 1414, 3080, does not affect the order of sale. *State v. District Court in and for Third Judicial Dist.*, 418.
3. **INJUNCTION—NECESSARY PARTIES.** In an action to enjoin the collection of a judgment, the judgment creditor or his legal representative is a necessary party. *Arnold v. Pope*, 204.
4. **RESTRAINING COLLECTION OF JUDGMENT—ACTION AGAINST SHERIFF ALONE.** A judgment debtor seeking to enjoin the collection of a judgment *held* to have no cause of action against the sheriff holding the execution. *Arnold v. Pope*, 204.

EXECUTORS AND ADMINISTRATORS.

ORDER OF DISTRIBUTION—COLLATERAL ATTACK. An order of distribution of a decedent's estate *held* not subject to collateral attack. *Kurtz v. Ogden Canyon Sanitarium Co.*, 315.

FALSE IMPRISONMENT.

1. **NATURE AND ELEMENTS—"FALSE."** "False imprisonment" defined. *Smith v. Clark*, 116.

2. **LIABILITY OF COMPLAINANT.** A party making and verifying a complaint before a justice cannot be held liable as a trespasser for false imprisonment of the person complained of, arrested upon a warrant issued by the justice, where he took no part in the proceeding except the making of the complaint. *Smith v. Clark, 116.*
3. **SAME—PLEADING.** Plaintiff, in an action for false imprisonment, must plead that the imprisonment was wrongful or unlawful, or the facts and the circumstances showing the unlawfulness thereof. *Smith v. Clark, 116.*
4. **SAME—JUSTIFICATION.** The rule that every imprisonment of a man is prima facie a trespass, and in an action to recover therefor, if the imprisonment is proved or admitted, the burden of justifying it is on the defendant, does not apply to a person who made the complaint before the justice, but took no other part in the proceedings. *Smith v. Clark, 116.*
5. **SAME.** Where, in an action for false imprisonment, the facts show a prima facie case for the plaintiff, the duty is then upon defendant to show legal justification for the imprisonment. *Smith v. Clark, 116.*
6. **SAME.** In an action for false imprisonment, where plaintiff, by his own evidence, shows that he was imprisoned as the result of a judicial proceeding and by a warrant, or other legal process issued thereon, he is required, in order to make a prima facie case, to show something more than detention or imprisonment. *Smith v. Clark, 116.*
7. **SAME—INSTRUCTIONS.** In an action for false imprisonment of a party arrested under a void warrant of a justice, an instruction held erroneous, as conveying the idea that the person making the complaint in the justice court was a trespasser and liable for false imprisonment. *Smith v. Clark, 116.*
8. **SAME.** In an action for false imprisonment, where the party who made the complaint took no part in the subsequent proceedings, and was made a defendant, it was error to instruct that all parties having to do with the procurement and service of the warrant would be liable. *Smith v. Clark, 116.*

FOOD.

ORDINANCES—VALIDITY—POLICE POWER—SALE OF MILK. Under Comp. Laws 1907, section 206, subds. 44, 45, 65, 88, a municipality held authority to enact an ordinance regulating the inspection and sale of milk, and making it an offense to sell milk within the city without a permit. *Salt Lake City v. Howe, 170.*

FORCIBLE ENTRY AND DETAINER.

1. **STATUTORY PROVISIONS—AS TO APPEAL.** Comp. Laws 1907, section 3586, prescribing a special time for taking proceedings for appeal in forcible entry and detainer, is valid. *Hunsaker v. Harris, 226.*
2. **APPEAL IN CASES OF.** The time for taking proceedings on appeal in forcible entry and detainer held, governed by Comp. Laws 1907, sections 3586, 3587 and not by section 3301. *Hunsaker v. Harris, 226.*

FRAUDS, STATUTE OF.

AUTHORITY TO PURCHASE LAND—NECESSITY OF WRITING. That authority of agents to purchase land was not in writing held not to invalidate a contract signed by them. *LeVine v. Whitehouse*, 260.

GAMING.

1. **ACTIONS FOR THE RECOVERY OF MONEY—INSTRUCTIONS.** Evidence in an action by a wife to recover the proceeds of the sale of the homestead, lost by the husband in gambling, held insufficient to require the court to direct a verdict in favor of plaintiff. *Terry v. Peterson*, 401.
2. **SAME.** An instruction in an action by a wife to recover money lost by her husband in gambling held not erroneous. *Terry v. Peterson*, 401.

GUARDIAN AD LITEM.

INFANTS. Comp. Laws 1907, sections 2907, 2908, authorize the appointment of a guardian *ad litem* for resident and non-resident minor plaintiffs as well as resident and non-resident minor defendants. *Schuyler v. Southern Pac. Co.*, 581.

INDIANS.

INDIAN RESERVATION—TITLE TO LANDS IN. No private rights in the lands of an Indian reservation can be acquired. *Sowards v. Meagher*, 212.

INFANTS.

ACTIONS BY—APPOINTMENT OF GUARDIAN AD LITEM. Comp. Laws 1907, sections 2907, 2908, authorize the appointment of a guardian *ad litem* for resident and non-resident minor plaintiffs as well as resident and non-resident minor defendants. *Schuyler v. Southern Pac. Co.*, 581.

INTEREST.

SUSPENSION—KEEPING TENDER GOOD. To discharge interest, a tender must be kept good by payment into court. *LeVine v. Whitehouse*, 260.

JUDGMENT.

1. **CONFINED TO ISSUES.** Where, in an action to quiet title, in which defendant claimed that a certain fence was the boundary, the pleadings and evidence did not raise the question as to defendant's right to have plaintiff erect a fence upon the boundary line to which defendant claimed, the decree for defendant improperly required plaintiff to erect such fence. *Rydalch v. Anderson*, 99.
2. **FINDINGS OF FACT—PROBATIVE FACTS—ULTIMATE FACTS.** If all the probative facts are found from which the ultimate facts must necessarily follow, the judgment is good, though based entirely on the probative facts. *Sierra Nevada Lumber Co. v. McCormick*, 160.
3. **SAME.** When the ultimate fact is found, the judgment rests on it, and not on the probative facts. *Sierra Nevada Lumber Co. v. McCormick*, 160.

4. **NOT EVIDENCE OF MARRIAGE.** A judgment in an action to recover dower in land purchased from the husband, in which the widow's marriage was in issue and established, is not admissible in a subsequent action against strangers to that judgment to prove the marriage. *Hilton v. Snyder*, 384.
5. **SAME.** In an action against grantees of the husband during his lifetime by the widow to claim dower in the lands conveyed, a judgment in a former action by the widow against the estate to establish her marriage and for the award of dower held not admissible to prove marriage. *Hilton v. Snyder*, 384.
6. **BAR—JUDGMENT OF NONSUIT.** A judgment of nonsuit held not to be a bar to a future action on the same cause of action. *Robinson v. Salt Lake City*, 520.
7. **FORMAL REQUISITES.** Formal requisites of a judgment stated. *Robinson v. Salt Lake City*, 520.
8. **ISSUES—ELIMINATION OF.** In an action against a bank for money claimed to have been deposited and not checked out, statement by defendant's counsel at trial held to have eliminated all other issues than the genuineness of plaintiff's signature to a canceled check. *Fee v. National Bank of the Republic*, 28.
9. **ENTRY OF.** It will be presumed on appeal that the duty of the clerk to enter judgment in a judgment book under Comp. Laws 1907, Sec. 3195, has been performed. *Robinson v. Salt Lake City*, 520.
10. **SAME.** Under Comp. Laws 1907, Secs. 3195, 3197, 3301, a judgment must be entered in the judgment book before an appeal can be taken. *Robinson v. Salt Lake City*, 520.
11. **SET OFF—JUDGMENT AGAINST JUDGMENT.** That a judgment for damages for wrongfully levying upon exempt property was also exempt when rendered would not prevent a judgment against a person, in whose favor the exempt judgment was rendered, from being set off against such judgment, after it and the claim on which it was based had ceased to be exempt by the owner leaving the state. *Snow v. West*, 528.
12. **COLLATERAL ATTACK.** An order of distribution of a decedent's estate held not subject to collateral attack. *Kurtz v. Ogden Canyon Sanitarium Co.*, 318.

LOST INSTRUMENTS.

EVIDENCE. Evidence of contents of lost deed claimed as color of title held sufficient. *Bingham Livery & Transfer Co. v. McDonald*, 457.

MALICIOUS PROSECUTION.

1. **WANT OF PROBABLE CAUSE—RESULT OF PROSECUTION.** In an action for false imprisonment, discharge without hearing or judicial investigation held no proof of want of probable cause for the prosecution. *Smith v. Clark*, 116.
2. **SAME—EVIDENCE.** In an action for false imprisonment of plaintiff, charged with larceny of brick, evidence of the records in a suit determining the title to the brick, held properly admitted. *Smith v. Clark*, 116.

MASTER AND SERVANT.

1. **ASSUMPTION OF RISK—OBVIOUS DANGER.** A section hand *held* to have assumed the risk of injuries from ties falling on him, which were pulled down from the end of a box car for unloading. *Tadd v. San Pedro, L. A. & S. L. R. Co., 207.*
2. **INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.** In an action by a section hand for injuries received while unloading ties from a pile in a box car, evidence *held* not to show that the method of getting the ties down from pile was not reasonably safe. *Tadd v. San Pedro, L. A. & S. L. R. Co., 207.*
3. **SAME.** That plaintiff's foreman was vexed and in a hurry, while engaged in pulling down ties from the end of a box car for unloading, *held* not to tend to prove negligence. *Tadd v. San Pedro, L. A. & S. L. R. Co., 207.*
4. **SAME—SUFFICIENCY OF EVIDENCE—SERVANT'S APPRECIATION OF DANGER.** In a section hand's action for injuries by cross-ties falling upon him, which were being pulled down from the end of a box car for unloading, evidence *held* to show that plaintiff fully appreciated the danger to which he was exposed in doing the work. *Tadd v. San Pedro, L. A. & S. L. R. Co., 207.*
5. **DEATH OF A SERVANT—MINES—EVIDENCE.** In an action for the death of a miner by rock falling from the roof, evidence that earth and rock had fallen from the roof prior to the accident and at other places *held* admissible. *Sargent v. Union Fuel Co., 392.*
6. **ASSUMPTION OF RISK—OBVIOUS DANGERS.** An employee *held* to have assumed the risk of injury from a rail falling from a flat car after being thrown on for the purpose of loading. *Pulos v. Denver & R. G. R. Co., 238.*
7. **DANGER OBVIOUS.** Evidence *held* to show that the dangers of injury from a rail falling from a flat car after being thrown on in loading were as obvious to plaintiff as to the foreman. *Pulos v. Denver & R. G. R. Co., 238.*

MINES AND MINERALS.

OPTION TO PURCHASE—CONDITIONAL. Defendant's liability to pay plaintiffs the balance of the consideration for an assignment of an option to purchase a mine *held* conditional on defendant's election to take up the option. *Caine v. Hagenbarth, 69.*

MORTGAGES.

1. **FORECLOSURE—ATTORNEY'S FEES—EVIDENCE AS TO AMOUNT.** Under Comp. Laws 1907, Sec. 3505, the court may hear testimony of attorneys to aid it in fixing a reasonable fee, though the mortgage provides a definite sum therefor. *Kurtz v. Ogden Canyon Sanitarium Co., 513.*
2. **FRAUD—EVIDENCE.** Evidence *held* to show that defendant executed a mortgage and note to plaintiff's bank without consideration, under the misapprehension that she was securing a debt of her son's company to the bank, while in fact she was securing the debt of others to the bank; she being induced to do so by a fraudulent scheme of her son and plaintiff. *McCor-mick v. Levy, 134.*

3. **JOINDER OF CAUSES OF ACTION ON SEPARATE NOTES—SEPARATE NOTES.** The causes of action on separate notes secured by the same mortgage may be joined in one action for foreclosure. *Kurtz v. Ogden Canyon Sanitarium Co.*, 313.
4. **CORPORATE OFFICERS.** There being no fraud in securing by mortgage a debt paid by a corporate director held that the mortgage is valid. *Kurtz v. Ogden Canyon Sanitarium Co.*, 313.

MUNICIPAL CORPORATIONS.

1. **INJURIES FROM DEFECTS IN STREETS—ACTIONS—QUESTION FOR JURY.** In an action against a municipality for injuries resulting from a defect in a street, the question of defendant's negligence held for the jury. *Robinson v. Salt Lake City*, 520.
2. **SAME—NOTICE OF DEFECT.** Where, in an action against a city for injuries resulting from an excavation in a street, the jury find that some stranger made the excavation, the question of whether the city had notice of its existence and character is one of fact. *Robinson v. Salt Lake City*, 520.
3. **STREETS—ABANDONMENT BY PUBLIC—EFFECT ON RIGHTS OF PROPERTY OWNERS.** While the public may abandon a street so far as its rights therein are concerned, such abandonment does not affect the rights of abutting owners to an easement therein for ingress and egress. *Hague v. Juab County Mill & Elevator Co.*, 290.
4. **OBSTRUCTIONS OF STREETS—ACCESS OVER STREET—OBSTRUCTION BY FLUME.** Defendant, who had a right to maintain a mill flume in a public street abutting plaintiff's property, held not entitled to increase the height of the banks of the flume so as to interfere with plaintiff's rights in the streets. *Hague v. Juab County Mill & Elevator Co.*, 290.
5. **SAME—REMEDIES OF PROPERTY OWNERS—INJUNCTION.** The maintenance of a mill flume in a public street so as to prevent access thereto by an abutting owner held a nuisance, which could be abated by injunction. *Hague v. Juab County Mill & Elevator Co.*, 290.
6. **SAME—DECREE.** In a suit by an abutting owner to enjoin the maintenance of the banks of a flume in an adjacent street beyond a certain height, decree for complainant held not uncertain as to the height at which the banks of the flume were to be maintained, and so as to make it unenforceable. *Hague v. Juab County Mill & Elevator Co.*, 290.
7. **ORDINANCES—SUBJECTS AND TITLES.** Const. art 6, sections 22, 23, do not apply to municipal ordinances, and, in the absence of other constitutional or statutory provisions, an ordinance need not express its subject-matter in its title. *Salt Lake City v. Howe*, 170.
8. **POLICE POWERS—LEGISLATIVE AUTHORITY—CONCURRENT REGULATIONS.** The Legislature can confer police powers upon a city over subjects included within existing statutes and authorize it to prohibit and punish by ordinance acts which are also prohibited and punishable by the statute. *Salt Lake City v. Howe*, 170.

9. **ORDINANCES—VALIDITY—CONFLICT WITH STATUTES—PENALTIES.** An ordinance imposing a penalty for selling milk without a permit *held* not to conflict with Comp. Laws 1907, tit. 18, sections 729-746x39, imposing a different penalty for violating the inhibitions and regulations contained therein, and to be valid, in view of Comp. Laws 1907, section 206, subd. 88. *Salt Lake City v. Howe*, 170.
10. **CARE OF STREETS.** Duty of a city as to care of streets stated. *Bills v. Salt Lake City*, 507.
11. **DEFECT IN STREET—CONTRIBUTORY NEGLIGENCE.** A traveler must avoid defects that are obvious and apparent, and, if he fails in this duty, he may be guilty of contributory negligence. *Bills v. Salt Lake City*, 507.
12. **STREETS—ASSUMPTION AS TO SAFE CONDITION.** Every one using a public street has a right to assume that the streets, to the extent that they are open for travel, are in a reasonably safe condition for that purpose. *Bills v. Salt Lake City*, 507.
13. **DEFECT IN STREET—INJURIES.** In an action for injuries to one riding a bicycle owing to a defect in a street, an instruction *held* erroneous. *Bills v. Salt Lake City*, 507.
14. **SAME—QUESTION FOR JURY.** The question whether a bicycle rider or any other person who is injured while passing along a street has exercised the degree of care required of him in view of all the circumstances should ordinarily be left to the jurors. *Bills v. Salt Lake City*, 507.
15. **DEFECT IN STREET—INJURIES.** In an accident to one riding a bicycle owing to an excavation in a street, an instruction *held* not erroneous. *Bills v. Salt Lake City*, 507.
16. **SAME.** In an action against a city for injuries to one riding a bicycle, an instruction *held* erroneous. *Bills v. Salt Lake City*, 507.
17. **ORDINANCES—REGULATING THE SALE OF FOOD.** Under Comp. Laws 1907, Sec. 206, Subds. 44, 45, 65, 88, a municipality *held* authorized to enact an ordinance regulating the inspection and sale of milk, and making it an offense to sell milk within the city without a permit. *Salt Lake City v. Howe*, 170.
18. **PUBLIC STREETS—RIGHTS IN.** Rights and duties of persons and railroad companies in the use of streets are reciprocal. *Cromeenes v. San Pedro, L. A. & S. L. R. Co.*, 475.
19. **ROADS AND STREETS—EASEMENT IN.** Where defendant had merely an easement in a street for maintaining a flume for mill purposes, he could acquire no more than the perpetual right to maintain the flume in the street for those purposes, and could not claim, by adverse possession, the legal title of that part of the street so as to enable him to maintain the flume banks at any height. *Hague v. Juab County Mill & Elevator Co.*, 290.

NATURALIZATION.

1. **FEES—CLERKS OF COURTS.** The principle that the incumbent of a public office must discharge the duties thereof for the com-

pensation fixed by law held not to prevent the clerk of a state district court performing services in naturalization proceedings under Act of Cong. June 29, 1906, C. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1909, p. 97) from retaining the fees as therein provided. *Eldredge v. Salt Lake County*, 188.

2. **STATE COURTS AGENTS OF FEDERAL GOVERNMENT.** The federal government in authorizing state courts to act in naturalization proceedings selects such courts and the clerks thereof as government agencies, through whom the government is discharging a function of sovereignty. *Eldredge v. Salt Lake County*, 188.

NEGLIGENCE.

1. **QUESTION FOR JURY.** In an action for injuries to plaintiff by the alleged negligence of defendant's servants in leaving a plumber's wrench on a stepladder, the issues of negligence and contributory negligence held under the evidence, for the jury. *Gibson v. George G. Doyle & Co.*, 21.
2. **CARRIERS—TRESPASSERS—DAMAGES.** In an action against a carrier to recover for the death of one alleged to have been a passenger there can be no recovery on the ground of ordinary negligence of defendant in injuring a person not a passenger. *Schuyler v. Southern Pac. Co.*, 581.
3. **PUBLIC STREETS—TRAVELER ON—CONTRIBUTORY NEGLIGENCE.** A traveler must avoid defects that are open and apparent, and, if he fails in this duty, he may be guilty of contributory negligence. *Bills v. Salt Lake City*, 507.
4. **PUBLIC STREETS—DUE CARE.** A pedestrian may act on the assumption that a railroad company will use ordinary care in running its trains across public streets and along thoroughfares of thickly populated districts of a city; but this does not relieve him of the duty to use due care. *Cromeenes v. San Pedro, L. A. & S. L. R. Co.*, 475.

NEGOTIABLE INSTRUMENTS.

JOINDER OF CAUSES OF ACTION—SEPARATE NOTES. The causes of action on separate notes secured by the same mortgage may be joined in one action for foreclosure. *Kurtz v. Ogden Canyon-Sanitarium Co.*, 313.

NEW TRIAL.

1. **MISCONDUCT OF PARTIES.** Defendant's failure to take a non-resident's deposition, after serving notice of his intention to take it upon plaintiff's counsel, held not such misconduct as would authorize a new trial. *Rydalch v. Anderson*, 99.
2. **NEWLY DISCOVERED EVIDENCE—EVIDENCE OF COLLATERAL MATTER.** A statement, contained in an affidavit filed with defendant's motion for a new trial, held not such newly discovered evidence as to require a new trial, only contradicting defendant's testimony and being upon a collateral matter. *Rydalch v. Anderson*, 99.
3. **SAME—PROBABLE EFFECT.** Where alleged newly discovered evidence for which plaintiff sought a new trial would merely effect defendant's credibility, and would not change the result even if

defendant's testimony on the question to which the newly discovered evidence related were eliminated, it was not ground for a new trial. *Rydalch v. Anderson*, 99.

4. **GROUND—INSTRUCTION—EVIDENCE TO SUPPORT.** A verdict for plaintiff held erroneous not because of the conflict in the instructions, but because it had no evidence to support it. *Pulos v. Denver & R. G. R. Co.*, 238.
5. **VERDICT CONTRARY TO INSTRUCTION.** Where the court instructed that defendant was not liable for the negligence of its foreman, and the evidence showed that, if plaintiff's injury was due to any negligence, it was that of the foreman, a general verdict for plaintiff is contrary to the instruction and without support of evidence. *Pulos v. Denver & R. G. R. Co.*, 238.
6. **SAME.** A new trial should be granted where the verdict is contrary to the instructions and without evidence to support it. *Pulos v. Denver & R. G. R. Co.*, 238.

PARTIES.

1. **CAPACITY TO SUE.** Every natural person of lawful age has legal capacity to sue. *Kurtz v. Ogden Canyon Sanitarium Co.*, 313.
2. **SUBSTITUTION.** Substitution of decedent's personal representative for his widow in an action for wrongful death held not a violation of the rule forbidding substitution of parties changing the cause of action. *Sargent v. Union Fuel Co.*, 392.
3. **CORPORATE NOTE—COLLATERAL TRUST DEED.** The payee of a corporate note held authorized to sue for the foreclosure of a collateral trust deed. *Kurtz v. Ogden Canyon Sanitarium Co.*, 313.
4. **MORTGAGE—FORECLOSURE OF.** A distributee of a decedent's estate who was appointed in the order of distribution as trustee for the other heirs held a proper party plaintiff to foreclose a trust deed payable to decedent's estate. *Kurtz v. Ogden Canyon Sanitarium Co.*, 313.
5. **COLLECTION OF JUDGMENT—INJUNCTION AGAINST.** In an action to enjoin the collection of a judgment the judgment creditor or his legal representative is a necessary party. *Arnold v. Pope*, 204.

PHYSICIANS AND SURGEONS.

1. **OPTOMETRY—REGULATION.** The Legislature held to have power to define and regulate the practice of optometry. *State v. Utah State Board of Examiners in Optometry*, 339.
2. **SAME—CERTIFICATES TO PRACTICE—STATUTES.** Comp. Laws 1907, Secs. 1685x1, 1686x5, held to give an applicant who was engaged in the practice of optometry the right to a certificate to practice, though he was not versed in all the methods of optometry as defined by the statute. *State v. Utah State Board of Examiners in Optometry*, 339.
3. **SAME—REVOCATION OF LICENSE.** An applicant for a certificate to practice optometry held entitled to a certificate, under Comp. Laws 1907, Secs. 1686x1, 1686x5, though the board had the power to revoke certificate for incompetency. *State v. Utah State Board of Examiners in Optometry*, 339.

PLEADING.

1. **PLEADING BY REFERENCE.** An answer, by referring to pleadings in a former action, made such pleadings a part of it by reference. *Holt v. Nielson*, 556.
2. **GROUND FOR DEMURRER—MISJOINDER OF CAUSES.** The objection to a complaint that several causes of action have been "commingled in one statement as one cause of action" is not a ground for demurrer, under Comp. Laws 1907, Sec. 2962, as a misjoinder of "several causes of action." *Kurtz v. Ogden Canyon Sanitarium Co.*, 515.
3. **COMPLAINT—COMMINGLING OF CAUSES.** The remedy for commingling in one statement several causes as one cause of action is a motion to require plaintiff to separately state his causes of action as required by Comp. Laws 1907, Sec. 2991. *Kurtz v. Ogden Canyon Sanitarium Co.*, 515.
4. **AMENDMENT—NEW ISSUES.** In an action for wrongful death, a trial amendment held properly allowed. *Sargent v. Union Fuel Co.*, 392.
5. **ADMISSIONS—CONCLUSIVENESS.** In an action to enjoin the maintenance of a flume adjacent to plaintiff's property, which he claimed interfered with his easement in a street, defendant held precluded by admissions in the answer from contending that the street had never been dedicated or established. *Hague v. Juab County Mill & Elevator Co.*, 290.
6. **COMPLAINT—JOINT DEMURRER.** Where a complaint in an action against several defendants stated a cause of action against some of them, it was good as against a joint demurrer by all. *Smith v. Clark*, 116.
7. **GENERAL DEMURRER—SCOPE OF.** A general demurrer reaches only defects of substance. *Arnold v. Pope*, 204.
8. **FALSE IMPRISONMENT.** Plaintiff in an action for false imprisonment, must plead that the imprisonment was wrongful or unlawful, or the facts and circumstances showing the unlawfulness thereof. *Smith v. Clark*, 116.
9. **DOWER—ESTOPPEL.** In view of Const. art. 8, Sec. 19, an equitable estoppel may be pleaded as a defense in a legal action for dower. *Hilton v. Sloan*, 359.
10. **BOUNDARY LINE—FENCE.** Where in an action to quiet title, in which defendant claimed that a certain fence was a boundary, the pleadings and evidence did not raise the question as to defendant's right to have plaintiff erect a fence upon the boundary line which defendant claimed, the decree for defendant improperly required plaintiff to erect such fence. *Rydalch v. Anderson*, 99.
11. **ACTION TO QUIET TITLE.** Under Comp. Laws 1907, Sec. 3511, a complaint in an action to quiet title need not allege possession in plaintiff. *Gibson v. McGurrian*, 158.

PRINCIPAL AND AGENT.

1. **AUTHORITY OF AGENT—RATIFICATION—QUESTION FOR JURY.** In an action by a purchaser of land to recover a deposit of ear-

nest money, evidence *held* insufficient to present an issue for the jury as to the authority of the depository to execute a contract of sale. *Tyng v. Constant-Lorraine Investment Co.*, 304.

2. **SAME.** In an action by a purchaser of land to recover a deposit of earnest money, evidence *held* insufficient to present an issue for the jury as to the ratification of the contract of sale. *Tyng v. Constant-Lorraine Investment Co.*, 304.
3. **AUTHORITY TO PURCHASE LAND.** That authority of agents to purchase land was not in writing *held* not to invalidate a contract signed by them. *LeVine v. Whitehouse*, 260.

PROCESS.

1. **SUBSTITUTED SERVICE—EFFECT—"PERSONAL SERVICE."** Substituted service under Comp. Laws 1907, Sec. 2948, subd. 8, constitutes personal service. *Grant v. Lawrence*, 450.
2. **SUBSTITUTED SERVICE—"PLACE OF ABODE"—"DOMICILE."** Service of summons by leaving a copy with the first wife of defendant at her place of abode, in which defendant had never lived, he being abroad at the time, *held* not to constitute substituted service under Comp. Laws 1907, Sec. 2948, subd. 8. *Grant v. Lawrence*, 450.

QUIETING TITLE.

1. **EJECTMENT—CHOICE OF REMEDIES.** One who claims title to property, and is in possession of the same, may bring an action to quiet title under Comp. Laws 1907, Sec. 3511. *Gibson v. McGurrian*, 158.
2. **PLEADING POSSESSION.** Under Comp. Laws 1907, Sec. 3511, a complaint in an action to quiet title need not allege possession in plaintiff. *Gibson v. McGurrian*, 158.
3. **NECESSITY FOR PROVING POSSESSION.** A claimant to property under Comp. Laws 1907, Sec. 3511, need not prove that he is either in possession, or entitled to possession. *Gibson v. McGurrian*, 158.
4. **EVIDENCE OF POSSESSION.** On proof of legal title by plaintiff in an action to quiet title, it will be presumed, in the absence of evidence to the contrary, that he was entitled to the actual possession. *Gibson v. McGurrian*, 158.
5. **FINDINGS—JUDGMENT.** A judgment in a suit to quiet title *held* not warranted by the findings. *Salt Lake Investment Co. v. Fox*, 354.

RAILROADS.

1. **USE OF STREETS—DUTIES OF PERSONS AND RAILROAD COMPANIES.** Rights and duties of persons and railroad companies in the use of streets are reciprocal. *Cromeenes v. San Pedro, L. A. & S. L. R. Co.*, 475.
2. **CARE IN RUNNING TRAIN—RIGHT TO PRESUME—DUTY OF PEDESTRIANS—USE OF DUE CARE.** A pedestrian may act on the assumption that a railroad company will use ordinary care in running its train across public streets and along thoroughfares

of thickly populated districts of a city; but this does not relieve him of the duty to use due care. *Cromeenes v. San Pedro, L. A. & S. L. R. Co.*, 475.

3. **KILLING BOY ON STREET—EVIDENCE OF NEGLIGENCE.** In an action for the death of a boy killed by a train running along a street, evidence held to support a finding that it was operated in a negligent manner. *Cromeenes v. San Pedro, L. A. & S. L. R. Co.*, 475.
4. **SAME—CONTRIBUTORY NEGLIGENCE.** In an action for the death of a boy killed by a train running along a street, his contributory negligence held under the evidence to be for the jury. *Cromeenes v. San Pedro, L. A. & S. L. R. Co.*, 475.
5. **CROSSING ACCIDENT—INSTRUCTIONS.** In an action for a death at a railroad crossing, charges held not to authorize the jury to speculate and base a verdict upon anything which they thought defendant should have done or omitted to do to prevent accidents at the crossing. *Evans v. Oregon Short Line R. Co.*, 451.

REAL PROPERTY.

1. **COLOR OF TITLE—LOST DEED.** Evidence of contents of lost deed claimed as color of title held sufficient. *Bingham Livery & T. Co. v. McDonald*, 457.
2. **BOUNDARY LINE—FENCE.** Where in an action to quiet title, in which defendant claimed that a certain fence was a boundary, the pleadings and evidence did not raise the question as to defendant's right to have plaintiff erect a fence upon the boundary line which defendant claimed, the decree for defendant improperly required plaintiff to erect such fence. *Rydalch v. Anderson*, 98.
3. **PUBLIC LANDS—PATENT TO—VALIDITY OF.** Where the government has by an official survey fixed the boundaries of an Indian reservation, and rights have been acquired thereunder to lands outside thereof, the patents are valid, though a subsequent survey makes the lands a part of the reservation. *Ferry v. Fowler*, 54.
4. **WATER COURSES—USE OF.** The owner of land crossed by a stream containing fish valuable for food was entitled to change the channel without injury to the public and utilize the old channel for fish pond and a hatchery. *State v. Barker*, 345.
5. **PUBLIC LANDS—WATER RIGHTS.** Trespassers on public lands held to have acquired right to exclusive use of water appropriated for irrigation and other purposes. *Patterson v. Ryan*, 410.
6. **PUBLIC DOMAIN—WATER RIGHTS.** Waters on public domain held subject to appropriation. *Sowards v. Meagher*, 312.

RECEIVERS.

1. **INSOLVENCY—RECEIVERS—RIGHTS OF ACTION.** A receiver of an insolvent corporation is authorized to intervene in an attachment suit against the corporation and move to set aside an order of sale of the attached property. *State v. District Court in and for Third Judicial Dist.*, 418.

2. CLAIMS AGAINST PROPERTY—LEAVE OF COURT TO SUE. The court appointing a receiver may on proper application grant leave to a person interested in the property in the receiver's hands to sell a portion of it and apply the proceeds on a lien on such portion in favor of the applicant. *State v. District Court in and for Third Judicial Dist.* 418.

REMOVAL OF CAUSES.

1. CONSTRUCTION OF PLEADINGS. Certain language of the Supreme Court in construing a complaint claimed to be based on the Hepburn Act (Act June 29, 1906, c. 3591, Sec. 1, par. 4, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1151]) held not to introduce a federal question into the case. *Schuyler v. Southern Pac. Co.*, 612.
2. GROUNDS FOR REMOVAL—CASES ARISING UNDER CONSTITUTION AND LAWS OF UNITED STATES. A case cannot be removed simply because, in the progress of the litigation, it may be necessary to give a construction to the Constitution or laws of the United States. *Schuyler v. Southern Pac. Co.*, 581.
3. SAME. In an action by the personal representatives of an assistant chief mail clerk against a carrier to recover for the death of such mail clerk, a complaint held not to present a federal question under Const. U. S., Art. 1, Sec. 8 (Act Cong. Feb. 4, 1887, as amended by Act June 29, 1906, Act Cong. June 13, 1898, and Act Cong. June 9, 1896), rendering the action removable to the federal court. *Schuyler v. Southern Pac. Co.*, 581.

SALES.

1. CONDITIONAL SALES—RIGHT OF THIRD PERSONS. Under a conditional sale, a third person cannot acquire any interest from the buyer, without the seller's consent, until the vesting of the title in the buyer. *Passow v. Emery*, 49.
2. ACTION FOR UNPAID PRICE—FINDINGS. A finding that a seller had fully performed his part of the contract held unauthorized, under the evidence. *Neuberger v. Robbins*, 197.
3. CONDITIONAL—CHATTEL MORTGAGES. Certain instruments held a contract of conditional sale and not a chattel mortgage, and not invalid as to the buyer's creditors for failure to comply with Comp. Laws 1907, Sec. 150, Subds. 2, 3, relating to chattel mortgages. *Passow v. Emery*, 49.

STATE.

OFFICERS—DUTIES. The state within its sphere held authorized to impose any duty it sees fit on an office which it has created, but may not without the consent of the federal government empower any state officer to discharge any function belonging to the federal government. *Eldredge v. Salt Lake County*, 188.

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Art. 21, Sec. 1, Salaries.....	190

STATUTES.

1. **CONSTRUCTION—EXECUTIVE CONSTRUCTION.** While the rulings of the Interstate Commerce Commission as to the construction to be given to federal statutes relating to interstate commerce will be given great weight by the courts in determining the meaning of such statutes, such weight is not to be accorded to such rulings, where they are given in a non-official character and in response to private inquiry. *Schuyler v. Southern Pac. Co.*, 581.
2. **SAME—EXCEPTIONS.** An exception of a particular thing from the operation of the general words of a statute tends to show that it was the opinion of the lawmakers that the thing excepted would have been within the general words had not the exception been made. *Schuyler v. Southern Pac. Co.*, 581.
3. **SAME—EXCEPTIONS IN PENAL STATUTES.** Exceptions in penal statutes ought to be liberally construed in favor of him who is charged with a violation of the statute. *Schuyler v. Southern Pac. Co.*, 581.

STOCK AND STOCKHOLDERS.

1. **CORPORATE BOOKS—INSPECTION OF.** Under Comp. Laws 1907, Sec. 329, a corporate stockholder has the right to inspect the corporate books to ascertain the names of the other stockholders, in the absence of any reason for denying such right. *State v. Silver King Consol. Mining Co. of Utah*, 62.
2. **STOCKHOLDERS—LIABILITY STATED.** Liability of subscribers to capital stock of a corporation stated under Const. art. 12, Secs. 5, 11, and Comp. Laws 1907, Secs. 316, 331, 432. *Rolapp v. Ogden & N. W. R. Co.*, 544.

STREET RAILROADS.

1. **DUTY OF TRAVELER ON STREETS—INSTRUCTIONS.** In an action for injuries from collision with a street car, held that instruction as to duty of plaintiff before crossing or going upon the track was not erroneous. *Grow v. Utah Light & Ry. Co.*, 41.
2. **SAME.** In an action for injuries from collision with a street car, held not error to refuse to instruct that it was not negligence as a matter of law for a person to fail to look and listen before driving upon a street car track. *Grow v. Utah Light & Ry. Co.*, 41.

STIPULATIONS.

HELD TO SUPPORT FINDINGS. Under a stipulation at trial, evidence, in an action to quiet title, held to support the finding that property described in the complaint was included within the description in a patent introduced in evidence. *Gibson v. McGurkin*, 158.

TAXATION.

1. **WRONGFUL ENFORCEMENT—CONVERSION—INSTRUCTIONS.** In an action against a county treasurer for conversion of stock sold for taxes, a charge held proper in view of Laws 1901, c. 105, Sec. 6. *Bown v. Owens*, 117.
2. **SAME.** Seizure and sale of stock for taxes held not a conversion. *Bown v. Owens*, 117.

TENDER.

INTEREST. To discharge interest, a tender must be kept good by payment into court. *LeVine v. Whitehouse*, 260.

TRIAL.

1. **NONSUIT—QUESTIONS OF LAW.** Where plaintiff's evidence and the inferences therefrom would authorize reasonable men to arrive at different conclusions as to whether all the essential facts were proven, the question is one of fact, although the evidence on some points may be very unsatisfactory. *Robinson v. Salt Lake City*, 520.
2. **NONSUIT—HEARING ON MOTION.** On motion for a nonsuit, *held*, that nothing is before the court except the question whether, in view of the evidence, the case is one which should be determined as a question of law. *Robinson v. Salt Lake City*, 520.
3. **SAME.** A judgment on nonsuit *held* sufficient. *Robinson v. Salt Lake City*, 520.
4. **FINDING—INCONSISTENT FACTS.** A finding of a certain amount due from plaintiff on a contract *held* inconsistent with the facts found as to the amounts paid and credits, etc. *Miller v. Mt. Nebo Land & Irrigation Co.*, 1.
5. **FINDING—MERE CONCLUSION CANNOT AID JUDGMENT.** In an action for damages for breach of a contract by failure to furnish water for irrigation as agreed, a finding that the shortage of water was caused by act of God was a mere conclusion which could not aid the judgment. *Miller v. Mt. Nebo Land & Irrigation Co.*, 1.
6. **SUBMISSION OF ISSUES TO JURY—EVIDENCE.** It is error to submit to the jury an issue as to which there is no evidence, since the jury has the right to assume that there is some evidence in the case from which they may make a finding on the issue. *Tyng v. Constant-Lorraine Investment Co.*, 304.
7. **ARGUMENT—COMMENT ON PLEADINGS—PROPRIETY.** If pleadings in a former action are made a part of the answer in another action by reference, counsel may comment thereon, in argument. *Holt v. Nielson*, 556.
8. **INSTRUCTIONS ALREADY GIVEN.** Where the substance of a requested charge was fully given by the court, the requested instruction was properly refused. *Holt v. Nielson*, 556.
9. **FINDINGS OF COURT—CONFORMITY TO EVIDENCE—HEARSAY.** Hearsay evidence could be ignored by the court in making findings on questions of fact. *Holt v. Nielson*, 556.
10. **INSTRUCTIONS—INVADING PROVINCE OF JURY.** In an action to recover for the death of a railway mail clerk, an instruction *held* erroneous as invading the province of the jury. *Schuyler v. Southern Pac. Co.*, 581.
11. **SAME—DUTY OF JURY TO FOLLOW.** The jury is bound to follow the instructions of the court, whether such instructions are right or wrong. *Schuyler v. Southern Pac. Co.*, 581.

12. **FINDINGS OF FACT—CONCLUSIONS OF LAW.** Where the facts found support a conclusion of law, the fact that the conclusion is stated in the findings of fact, instead of the conclusions made by the court, is immaterial. *Gay v. Young Men's Consol. Co-op. Mercantile Inst.*, 280.
13. **SAME.** A finding held not a finding of fact, but a conclusion of law, deductible from facts. *Gay v. Young Men's Consol. Co-op. Mercantile Inst.*, 280.
14. **ISSUES—FINDINGS.** In a suit to quiet title, the finding held not without the issues. *Salt Lake Investment Co. v. Fox*, 334.
15. **INSTRUCTIONS—EVIDENCE—PRESUMPTION—CONTRIBUTORY NEGLIGENCE.** In a death action, charges held not to throw a presumption into the balance to be weighed against the evidence in support of defendant's plea of contributory negligence. *Evans v. Oregon Short Line R. Co.*, 471.
16. **REFUSAL OF REQUEST—REQUEST EMBRACED IN CHARGE GIVEN.** It is not error to refuse a charge embraced in instructions given. *Evans v. Oregon Short Line R. Co.*, 471.
17. **REFUSAL OF REQUESTS—REQUESTS FAULTY IN PART.** It is not error to refuse a charge faulty in part. *Evans v. Oregon Short Line R. Co.*, 471.
18. **QUESTION NOT INDICATING TESTIMONY SOUGHT—MOTION TO STRIKE PROPER.** Where a question asked of a witness does not indicate that the testimony sought thereby is objectionable, it is not error to overrule objections thereto, and, if the answer contains objectionable testimony, the remedy is to move to strike. *Cromeenes v. San Pedro, L. A. & S. L. R. Co.*, 475.
19. **CHARGE TO BE CONSTRUED AS A WHOLE.** All instructions must be considered together, and if, as a whole, they correctly state the law applicable to the issues, it is not error that the law applicable to different questions involved is separately stated. *Cromeenes v. San Pedro, L. A. & S. L. R. Co.*, 475.
20. **SAME.** A charge construed as a whole held to sufficiently present the question of contributory negligence of a boy killed by a train. *Cromeenes v. San Pedro, L. A. & S. L. R. Co.*, 475.
21. **INSTRUCTION—REQUESTS TO CHARGE—MODIFICATION OF.** Modification of a request to charge by merely eliminating argumentative matter therefrom was not error. *Gibson v. George G. Doyle & Co.*, 21.
22. **INSTRUCTIONS—EXCEPTIONS.** When an instruction contains several propositions, some of which are sound, an exception to it as a whole will not be considered. *Grow v. Utah Light & Ry. Co.*, 41.
23. **SAME—BURDEN OF PROOF.** In an action for injuries from collision with a street car, an instruction that the burden was on plaintiff to prove by a preponderance of the evidence that he was injured by the negligence of defendant, etc., without fault on his part, held not erroneous. *Grow v. Utah Light & Ry. Co.*, 41.

24. **INSTRUCTION—ASSUMING FACTS.** The trial court should not assume facts unless they are undisputed or belong to a class where a court is bound to judicially note and declare them. *Bills v. Salt Lake City*, 507.
25. **TAKING PLEADINGS TO JURY ROOM.** It is not proper to permit the jury to take the pleadings with them to the jury room unless they have been put in evidence as proof of some fact and made exhibits in the case. *Pulos v. Denver & R. G. R. Co.*, 238.
26. **ISSUES—FINDINGS.** A finding entirely outside of the issues is erroneous. *Neuberger v. Robbins*, 197.
27. **INSTRUCTIONS—SUFFICIENCY.** Instructions should not be mere abstract statements of law. *Smith v. Clark*, 116.
28. **FINDINGS OF FACT—ULTIMATE FACTS.** Findings should be limited to ultimate facts. *Sierra Nevada Lumber Co. v. McCormick*, 150.
29. **SAME.** If the court makes a finding of ultimate facts and additional findings of probative facts not shown to be the only probative facts established by the evidence, the judgment rendered in accordance with the ultimate facts cannot be attacked on the ground that the first findings are not true because contradicted by the probative facts. *Sierra Nevada Lumber Co. v. McCormick*, 150.
30. **SAME.** No finding of probative facts tending to establish that the ultimate fact was found against the evidence can overcome the finding of the ultimate fact. *Sierra Nevada Lumber Co. v. McCormick*, 150.
31. **OBJECTIONS—EXCEPTIONS.** Objections having been properly made and exceptions taken to a certain line of testimony, the objecting party, to save the question for review, need not object to each question thereafter asked the witness as to the same matter. *Cromeenes v. San Pedro, L. A. & S. L. R. R. Co.*, 475.
32. **INSTRUCTIONS—EFFECT OF VOLUMINOUS.** That instructions are long and to some extent repeated will not affect the verdict or judgment otherwise without prejudicial error. *Evans v. Evans Oregon Short Line R. Co.*, 431.
33. **DISCRETION OF COURT—EXAMINATION OF DOCUMENTS.** It was within the trial court's discretion to permit a witness to examine the instrument to which his alleged signature was attached before stating whether his signature was genuine, and this ruling will not be disturbed on appeal, in the absence of a prejudicial abuse of discretion. *Fee v. Nat'l Bank of Republic*, 28.
34. **FINDINGS OF FACT—PROBATIVE—ULTIMATE.** If all the probative facts are found from which the ultimate facts must necessarily follow, the judgment is good though based entirely on the probative facts. *Sierra Nev. L. Co. v. McCormick*, 150.

35. **SAME.** When the ultimate fact is found, the judgment rests on it and not on the probative facts. *Sierra Nev. L. Co. v. McCormick*, 150.
36. **ISSUES—STATEMENT OF COUNSEL.** In an action against a bank for money claimed to have been deposited and not checked out, statement by defendant's counsel at trial *held* to have eliminated all other issues than the genuineness of plaintiff's signature to a cancelled check. *Fee v. Nat'l Bank of Republic*, 28.
37. **STREETS—DEFECTS—NOTICE.** Where in an action against a city for injury resulting from an excavation in a street, the jury finds that some stranger made the excavation, the question of whether the city had notice of its existence and character is one of fact. *Robinson v. Salt Lake City*, 520.
38. **PUBLIC STREETS—TRAVEL ON—CARE REQUIRED—QUESTION FOR JURY.** The question whether a bicycle rider or any other person who is injured while passing along a street has exercised the degree of care required of him in view of all the circumstances should ordinarily be left to the jury. *Bills v. Salt Lake City*, 507.
39. **ACTION TO QUIET TITLE—POSSESSION—PROOF OF.** A claimant to property under Comp. Laws 1907, Sec. 3511 need not prove that he is either in possession, or entitled to possession. *Gibson v. McGurrian*, 158.

TRUSTS AND TRUSTEE.

1. **RESULTING TRUST—CONVEYANCE TO SECURE DEBT OF ANOTHER.** A corporation *held* a trustee of real estate conveyed to it. *Gay v. Young Men's Consol. Co-op. Mercantile Inst.*, 280.
2. **VOLUNTEER TRUSTEE.** Where a corporation holding land in trust transferred it to an officer, the latter *held* a volunteer trustee. *Gay v. Young Men's Consol. Co-op. Mercantile Inst.*, 280.
6. **SALE BY TRUSTEE—TERMS OF SALE—OBLIGATION OF TRUSTEE.** A corporation accepting a conveyance of land in trust to sell for the best price obtainable *held* liable to the grantor for the difference between what the property was actually sold for and what the corporation could have obtained for it. *Gay v. Young Men's Consol. Co-op. Mercantile Inst.*, 280.
4. **CORPORATION AS TRUSTEE—LIABILITY OF.** A corporation accepting a conveyance of land in trust to sell and account for the proceeds *held* liable to the grantor for a specified sum. *Gay v. Young Men's Consol. Co-op. Mercantile Inst.*, 280.

VENDOR AND PURCHASER.

1. **RESCISSION FOR FRAUD—WAIVER OF RIGHT.** Vendors *held* to have waived whatever right they had to rescind for fraud. *Le Vine v. Whitehouse*, 260.
2. **BREACH OF CONTRACT—FAILURE TO PAY TAXES.** Failure of purchasers to pay taxes on land sold *held* not to be a breach of contract. *Le Vine v. Whitehouse*, 260.
3. **BONA FIDE PURCHASER—NOTICE PUTTING ON INQUIRY.** Purchasers *held* to be charged with the same knowledge as to their rights as they would have acquired had they inquired as to an

equity of third persons, and not relieved from inquiring by assurances that the contract on which the equity was based was abandoned. *Le Vine v. Whitehouse*, 260.

4. **BONA FIDE PURCHASER—EVIDENCE.** Evidence held to show that a certain party was not a bona fide purchaser without notice. *Le Vine v. Whitehouse*, 260.
5. **OPTION TO PURCHASE.** The terms of an option for the purchase of land held to be determined from correspondence, and not from a formal contract executed by a bank without authority. *Tyng v. Constant-Loraine Investment Co.*, 304.
6. **REMEDIES OF PURCHASER—RECOVERY OF PRICE—ISSUES.** A purchaser of land suing to recover the price, and basing his cause of action on a contract executed without authority, held not entitled to recover on the contract evidenced by letters and telegrams. *Tyng v. Constant-Loraine Investment Co.*, 304.

WATERS AND WATER COURSES.

1. **CHANGE OF CHANNEL—USE OF OLD CHANNEL—FISH PONDS.** The owner of land crossed by a stream containing fish valuable for food was entitled to change the channel without injury to the public and utilize the old channel for fish ponds and a hatchery. *State v. Barker*, 345.
2. **APPROPRIATION BY TRESPASSER—EXTENT OF RIGHTS.** Rights acquired by trespasser using water on public land for purposes other than those of irrigation stated. *Patterson v. Ryan*, 410.
3. **SAME.** Trespassers on land held to have acquired right to exclusive use of water appropriated for irrigation or other purposes. *Patterson v. Ryan*, 410.
4. **SAME.** Rights acquired by person using water on public land without posting notice of intention to appropriate for purposes other than those of irrigation stated. *Patterson v. Ryan*, 410.
5. **SAME.** Rights acquired by person using water on public land for purposes other than those of irrigation to use the quantity which he used stated. *Patterson v. Ryan*, 410.
6. **SAME.** Rights acquired by person using water on public land for purposes other than those of irrigation to divert the water to other land stated. *Patterson v. Ryan*, 410.
7. **SAME.** Trespassers on land held to have acquired right to exclusive use of water appropriated for irrigation of other purposes. *Patterson v. Ryan*, 410.
8. **APPROPRIATION—LAWS GOVERNING.** Appropriation of public waters held governed by the laws and customs of the state. *Sowards v. Meagher*, 212.
9. **PUBLIC LANDS—ACQUISITION OF RIGHTS.** Under Comp. Laws, Sec. 1288x et seq., an inceptive right to appropriate public water on an Indian reservation held acquired before the lands are subject to entry on restoration to the public domain. *Sowards v. Meagher*, 212.

10. **APPROPRIATION OF WATER ESSENTIALS.** Essentials of a valid appropriation of water stated. *Sowards v. Meagher, 212.*
11. **SAME—EFFECT.** Effect of application to the state engineer for permission to appropriate public water stated. *Sowards v. Meagher, 212.*
12. **SAME—CONFLICTING RIGHTS.** To establish a right to appropriate water, one must rely on the strength of his own right, and not on the weakness of his adversary's. *Sowards v. Meagher, 212.*
13. **PUBLIC DOMAIN WATERS ON—RIGHT TO APPROPRIATE.** Waters on public domain held subject to appropriation. *Sowards v. Meagher, 212.*
14. **APPROPRIATION—EXTENT OF RIGHTS.** Rights under an appropriation of water are limited to the quantity actually used for a beneficial purpose. *Sowards v. Meagher, 212.*
15. **PUBLIC WATERS—PUBLIC LANDS.** The right to use unappropriated waters on the public domain and a right in the land itself are severable; the former not depending upon the latter. *Sowards v. Meagher, 212.*

WILLS.

LETTER—HELD NOT TO BE A WILL. A letter held not to show an intention to make a present disposition of the writer's property, so that it was not admissible to probate as a will. *In re Jensen's Estate, 428.*

WITNESSES.

1. **SUBPOENA—SERVICE—PERSONS AUTHORIZED TO SERVE.** A subpoena may be served by any person. *Holt v. Nielson, 556.*
2. **MILEAGE FEES.** In view of Comp. Laws 1907, Secs. 994, 3419, witnesses served with subpoenas at place of trial after being notified by telephone that they were subpoenaed held entitled to mileage fees from their homes to place of trial. *Holt v. Nielson, 556.*
3. **SAME—LEGALLY REQUIRED TO ATTEND.** Witnesses held legally required to attend court within Comp. Laws 1907, Sec. 994, so as to be entitled to mileage fees from their home to the place of trial. *Holt v. Nielson, 556.*
4. **EXAMINATION—REDIRECT EXAMINATION.** A question held not proper redirect examination. *Holt v. Nielson, 556.*
5. **CROSS-EXAMINATION—DISCRETION OF TRIAL COURT.** Discretion is lodged with the trial court as to questions on cross-examination. *Holt v. Nielson, 556.*

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